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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

MICHAELMAS TERM, 1840, TO MICHAELMAS TERM, 1841.

—◆—
BY

ALFRED DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

—◆—
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A

TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

ERRATA.

Page

- 139, marginal note, for "effects, read " efforts."
- 163, line 6, for " from," read " to," and for " to," read " from."
- 557, marginal note, for " excuse," read " crasure."
- 781, note (a), lines 11 and 18, for " Duchy," read " County Palatine."
- 807, line 11 from bottom, for " replication," read " declaration."

Arbourn v. Anderson	-	333
Archer v. Brindley	-	38
——, Gent., one, &c., v.		
English and Walker	-	21
—— v. Owen	-	341
—— v. Smith	-	99
Attorney General v. Donald-		
son and Others	-	319
—— v. Lord		
Churchill	-	772
Austen v. Evans	-	408

B.

Baddeley, Macclesfield,		
Lord, v.	-	312

VOL. IX.

Beale, Palmer v.	-	329
Beard v. M'Carthy	-	136
Beck v. Cleaver	-	111
Bedward, Morris v.	-	130
Bell v. Bament	-	810
—— v. Tidd	-	949
Bellamy, Bailey v.	-	507
Benn v. Bateman	-	763
Bennett v. Burton	-	492
—— and Wife, Doe d.		
Bailey and Another v.		1012
Bennison v. Thelwell	-	739
Benton, Collins v.	-	905
Beverley v. Christie	-	298
Bignall v. Gale	-	631
Bignold, Pontifex v.	-	863

a

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11

1

LONDON :
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V

E.			
Earl, Henry v.	-	-	725
Eaton, <i>In re</i>	-	-	207
Eden v. Britton	-	-	245
Edwards, Administratrix of Edwards v. Holiday and Others	-	-	1023
Edwards v. Napier	-	-	177
Eiffe v. Jacob	-	-	345
Elias v. Elias	-	-	104
Elliott v. Kendrick	-	-	195
Ellis, Doe d. Lewis v.	-	-	944
Elverd v. Foster	-	-	922
England v. Davison	-	-	1052
English and Walker, Archer, Gent., one, &c. v.			21
Evans, Arnold v.	-	-	219
——— Austen v.	-	-	408
——— <i>Ex parte</i>	-	-	106
——— and Another v. Maners	-	-	256
Everett v. Wells	-	-	424
Evrington, Robinson v.	-	-	107
Exeter, Bishop of, Regina v.			276
<i>Ex parte</i> Alice Shaw	-	-	839
——— Bousfield	-	-	616
——— Brown	-	-	526
——— Bruce	-	-	840

<i>Ex parte</i>	Dalton	-	-	110
————	Evans	-	-	106
————	Faith and another			973
————	Gray	-	-	336
————	Higginbotham	-		200
————	Inhabitants of			
	Jarvin	-	-	120
————	Knipe	-	-	108
————	Martins	-	-	194
————	Mary Williams	-		72
————	Parkes	-	-	614
————	Sharpe	-	-	513
————	Susan Stone	-		843
————	Tebbs	-	-	151
————	The Guardians			
	of Wallingford Union			987
————	Watkins	-	-	974
————	Wilkinson	-		320
————	Witty and Salt	-		138
————	Wybrow	-	-	197

F.

Faith and Another,	<i>Ex</i>	
<i>parte</i>	-	973
Faithful v. Achley	-	555
Falkes, Cooper v.	-	46
Faulkner and Another	<i>v.</i>	
Haslar	-	138
Fellingham v. Sparrow	-	141
Fellowes, Alford v.	-	326
Field, Phipps v.	-	738
Filmer v. Burnby	-	466
Firth, Wilson v.	-	573
Finden, Midford v.	-	813
Fisher v. Dudding	-	872
—— v. Lediard	-	545
Fitzgerald, Curling v.	-	394
Forbes v. Simmons	-	37
Forrester, Lord, Coy v.	-	770
Foster, Elverd v.	-	922
—— Mitchell v.	-	527
—— v. Pryme	-	749
Fowle v. Steinkeller	-	1037
Fowler v. Rickerby	-	682
Fox v. Veal	-	798
France v. Campbell	-	914
Franks v. Wicks	-	178, 489

Frazer, Watson v.	-	-	741
———— v. Welsh	-	-	754
Friden v. Bray -	-	-	329
Fry v. Monckton	-	-	967
Furney, Thompson v.	-	-	344

G.

Gale, Bignall v.	-	-	631
—— Bignold v.	-	-	393
Ganter, Vale v.	-	-	106
Garwood v. Bradburn	-	-	1031
Gee, Doe d. Turner v.	-	-	612
Generalis Regula	-	-	210
Gibbs v. Pike	-	-	731
Gibson, Thompson v.	-	-	717
—— Wainwright v.	-	-	100
Gillett v. Green	-	-	219
Gladwin v. Chilcote	-	-	550
Goden and Others, Palmer			
and Others v.	-	-	248
Godrick, Blackburn v.	-	-	337
Godwin, Cotton v.	-	-	763
Golney, Wheatley v.	-	-	1019
Goodman v. Trevanion	-	-	328
—— Kirman v.	-	-	330
Goodtitle d. Murrell v. Bad-			
title	-	-	1009
Goodwyn, Harris v.	-	-	409
Graham and Others, Car-			
ruthers v.	-	-	947
Gray, <i>Ex parte</i>	-	-	336
—— Priestley v.	-	-	154
Gregory, Regina v.	-	-	129
Green, Gillett v.	-	-	219
Greenway v. Titchmarsh	-	-	279
Greenwood v. Selden	-	-	72
Grice v. Lever	-	-	246
Griffiths v. Roberts	-	-	674
Gwynne v. Collins	-	-	70
—— v. Davy	-	-	1

H.

Haddon, Staite <i>v.</i>	-	-	995
———— Warne <i>v.</i>	-	-	960
Haigh, Ingliss <i>v.</i>	-	-	817
Haines, Slater <i>v.</i>	-	-	221

TABLE OF THE CASES.

vii

Hall, Ward v. - - -	610
Hallock v. University of Cambridge, Masters and Fellows of - - -	583
Hamer v. Anderton - - -	192
Hampshire (Justices of), Regina v. - - -	171
Harding v. Holden - - -	659
Harland, Newton v. - - -	641
——— and Others, Wife, and Newton v. - - -	16
——— and Another, Wife and Newton v. - - -	65
Harper v. Williams - - -	618
Harris, Chuck v. - - -	68
——— v. Goodwyn - - -	409
——— v. Turtle - - -	803
Haslar, Faulkner and An- other v. - - -	138
Haslop, Blunt v. - - -	982
Hawdon, Regina v. - - -	1007
Hawdone, <i>In re</i> - - -	970
Hawker, <i>In re</i> - - -	188
Hawkes, Thomas v. - - -	801
Hedges, Regina v. - - -	493
Herbert, Winsor v. - - -	237
Herts, (Sheriff of,) Regina v. - - -	916
Henry v. Earl - - -	725
Hickman, Doe d. Hickman v. - - -	364
——— Newman v. - - -	546
Higginbotham, <i>Ex parte</i> - - -	200
Hill, Poole v. - - -	300
——— v. Slocombe - - -	339
Hoare v. Robinson - - -	533
Holden, Harding v. - - -	659
Holding, Lewis v. - - -	652
Holiday and Others, Ed- wards, Administratrix of Edwards v. - - -	1023
———, <i>In re</i> - - -	1020
Holmes v. Russell - - -	487
Humphreys v. Budd - - -	1000
——— v. O'Connell - - -	213

I.

Ibbotson v. Chandler - - -	250
----------------------------	-----

Ingliss v. Haigh - - -	817
<i>In re</i> Arbitration, Woodcroft and Jones - - -	538
——— Eaton - - -	207
——— Hawker - - -	188
——— The Registrar of Births, &c., at Brixton - - -	927
In the matter of Hawdone - - -	970
——— of Arbitra- tion between Higham and Jessop - - -	203
——— of Holiday - - -	1020
——— of Arbitra- tion between Tandy and Tandy - - -	1044
——— of Arbitra- tion between Temple- man and Reed - - -	962
——— of Rogers - - -	926
Ive v. Scott and Another - - -	993

J.

Jackson, Richardson v. - - -	715
Jacob, Eiffe v. - - -	345
Jacques, Ross v. - - -	737
James, Webb v. - - -	314
——— v. Westdale - - -	104
Jarvin, (Justices of,) <i>Ex</i> <i>parte</i> - - -	120
Jenner, Davies v. - - -	45
Jennings, Smith v. - - -	155
Jessop and Higham, (be- tween Arbitration) In the matter of - - -	213
Johnstone v. Pring - - -	395
Jones v. Lewis - - -	143
——— v. Regan - - -	580
———, Stephen, Regina v. - - -	504
——— Administratrix of R. Jones v. Williams - - -	252
——— v. Williams - - -	702

K.

Keily, Temple v. - - -	62
------------------------	----

Kemble v. Mills	-	-	446
Kendrick, Elliott v.	-	-	195
Kenny v. Bishop	-	-	57
Kenrick v. Phillips	-	-	308
Key, Sharp v.	-	-	770
Kilpin, Schild v.	-	-	803
Kirwan v. Goodman	-	-	330
Knight v. Thynne	-	-	984
Knipe, <i>Ex parte</i>	-	-	108
Knott, Deane v.	-	-	224
Know v. Duncan	-	-	179
Knowelden, Smith v.	-	-	402

L.

Lamb v. Micklethwaite	-	-	531
Lea, Cope v.	-	-	102
Leach, Doe d. Edwards v.	-	-	877
Lediard, Fisher v.	-	-	545
Leek, Solomon v.	-	-	361
Legge v. Boyd	-	-	39
Lever, Grice v.	-	-	246
Lewis v. Holding	-	-	652
——, Jones v.	-	-	143
——, Wright v.	-	-	183
Lipman, Weedon v.	-	-	111
Little v. Newton	-	-	437
Lloyd, Carmarthenshire, (Sheriff of,) Bowser, Assignee of, v.	-	-	1029
——, Ward v.	-	-	213
Lockley v. Pye	-	-	744
Lockwood, Miers v.	-	-	975
Lott and Another v. Mel- ville	-	-	882
Lumb, Walker v.	-	-	131

M.

Maberley v. Pitterton	-	-	234
Macclesfield, Lord v. Bad- deley	-	-	312
Mackay v. Wood	-	-	278
M'Carthy, Beard v.	-	-	136

Malmesbury, The Mayor and Corporation of, Regina v.	-	-	359
Maners, Evans and Ano- ther v.	-	-	256
Mansyn, Braine v.	-	-	748
Marriott v. Stanley	-	-	59
Marshall, Sneeze v.	-	-	267
—— v. Parsons	-	-	251
Martins, <i>Ex parte</i>	-	-	194
Melville, Lott and Ano- ther v.	-	-	882
Memorandum	-	-	728
Merit and Others, Nicho- las v.	-	-	101
Micklethwaite, Lamb v.	-	-	531
Midford v. Finden	-	-	813
Middlesex, (Justices of), Regina v.	-	-	163
Miers v. Lockwood	-	-	975
Miller, Morgan v.	-	-	51
Mills v. Brown	-	-	151
——, Kemble v.	-	-	446
Milstead v. Cranfield	-	-	124
Mitchell v. Foster	-	-	527
Muggeridge v. Drew	-	-	1042
Monckton, Fry v.	-	-	967
Mondell v. Steele	-	-	812
Moore and Another, As- signees of Henry Tomp- kins, a Bankrupt, v. Phillips, Esq.	-	-	294
Morewood, Wood v.	-	-	44, 669
Morgan v. Miller	-	-	51
—— (an Infant by his next Friend) v. Thorne	-	-	226, 228
Morison v. Salmon	-	-	387
Morrell, Clark v.	-	-	461
Morris v. Bedward	-	-	130
—— v. Cox	-	-	661
Mosedon, Turquand and Others, Assignees of Vanderplank, a Bank- rupt v.	-	-	282
Munk v. Cass	-	-	332
Murray v. Boucher	-	-	537

TABLE OF THE CASES.

ix

N.

Napier, Edwards v. -	177
Nash v. Goode and Parry	929
Neeley, Quilters v. -	139
Newman, Parbury v. -	288
—— v. Hickman	546
—— v. Parbury	288
Newton, Cockburn v. -	676
—— v. Constable	933
—— v. Harland -	641
——, Little v. -	437
——, Towers v. -	576
—— and Wife v. Harland and Others -	16
—— and Wife v. Harland and Another -	65
Nicholas and Others v. Merit - -	101
Nicholls, Wyatt v. -	327
Nicholson, Potter v. -	808
Noble, Adlam v. -	322
Nottingham Journal and Others, (The Proprietors of,) Regina v. -	1042
Nugee v. Swinford -	1038

O.

O'Connell, Humphreys v. -	213
Osborne, Pigeon v. -	511
Owen, Archer v. -	341
Oxfordshire, (Justices of,) Regina v. - -	189

P.

Page v. Pearce - -	815
Paget, Regina v. - -	946
Palmer v. Beale - -	329
—— and Another v. Goden and Others -	248
Parbury, Newman v. -	288
—— v. Newman -	288
Parker, Saunderson v. -	495
—— and Another v. Smart - -	211

Parker, Pitt v. - -	1059
Parkes, <i>Ex parte</i> - -	614
Parry and Good, Nash v. -	929
Parsons, Marshall v. -	251
Partridge, Cottam v. -	629
Pearce, Page v. - -	815
—— v. Swain - -	732
Pearsall, <i>Re</i> - -	46
Peart, Christie v. - -	291
Percer, Dellevene v. -	244
Peto, Richardson v. -	73
Pewtress v. Annan - -	828
Phillips, Kenrick v. -	308
——, Esq., Moore, (Assignee of H. Tomkins, a Bankrupt,) v. -	294
Phipps v. Field - -	738
Pickford v. The Grand Junction Railway Co. -	766
Pigeon v. Osborne - -	511
Pike, Gibbs v. - -	731
Pitt v. Parker - -	1059
Pitterton, Maberly v. -	234
Polworth, Regina v. -	1048
Pontifex v. Bignold -	863
Poole v. Hill - -	300
Potter v. Nicholson -	808
Powell v. Ancell - -	893
Price v. Price - -	334
——, Price v. - -	334
Priestly v. Gray - -	154
Pring, Bush v. - -	180
—— Johnstone v. - -	395
Pryme, Foster v. - -	749
Purchell v. Salter - -	517
Pye, Lockley v. - -	744

Q.

Quayle, Regina v. - -	548
Quilters v. Neely - -	139

R.

Radnorshire, (The Justices of,) Regina v. - -	90
Ray, Bromage v. - -	559

<i>Re</i> Daly - - - - 380	Regina <i>v.</i> Stephen Jones - 504
— Pearsall - - - - 46	— <i>v.</i> Sussex, (Justices
— W. Tucker - - - 661	of) - - - - 125
— Watkins - - - - 58	— <i>v.</i> Taylor - - - 600
Reed and Templeman, <i>In</i>	— <i>v.</i> Trinity House,
<i>re</i> - - - - 962	Deptford Strond,
Regan <i>v.</i> Serle - - - 193	(Corporation of,) - 565
Regan, Jones <i>v.</i> - - - 580	— <i>v.</i> Tuddenham - 937
Regina <i>v.</i> Anderson - - 1041	— <i>v.</i> Wilts, (Justices
— <i>v.</i> Barton, (The Jus-	of) - - - - 524
tices of) - - - - 1021	— <i>v.</i> Wood - - - 310
— <i>v.</i> Blackwall Rail-	Registrar of Births, &c., at
way, (Directors of,) - 558	Brixton, <i>In re</i> - - 927
— <i>v.</i> Butcher - - - 135	Regula Generalis - - 210
— <i>v.</i> Denbighshire,	Richards, Curtis <i>v.</i> - 845
(Justices of,) - - - 509	Richardson <i>v.</i> Jackson - 715
— <i>v.</i> Exeter, (Bishop	— <i>v.</i> Peto - - - 73
of,) - - - - 276	Rickerby, Fowler <i>v.</i> - 682
— <i>v.</i> Gregory - - - 129	Ridgway, Chesser <i>v.</i> - 67
— <i>v.</i> Hampshire, (Jus-	Roberts, Griffiths <i>v.</i> - 674
tices of,) - - - - 171	Robinson <i>v.</i> Evrington - 107
— <i>v.</i> Hawdon - - - 1007	— Hoare <i>v.</i> - - - 533
— <i>v.</i> Hedges - - - 493	Roe, Boucher <i>v.</i> - - 329
— <i>v.</i> Herts, (The	— Doe <i>d.</i> Brook <i>v.</i> - 347
Sheriff of,) - - - 916	— <i>d.</i> Chadwick <i>v.</i> - 402
— <i>v.</i> Malmesbury,	— <i>d.</i> Chaffey <i>v.</i> - 100
(The Mayor and Cor-	— <i>d.</i> Channell <i>v.</i> - 67
poration of,) - - - 359	— <i>d.</i> Cuttell <i>v.</i> - 1023
— <i>v.</i> Middlesex, (Jus-	— <i>d.</i> Dickenson <i>v.</i> - 363
tices of,) - - - - 163	— <i>d.</i> Evans <i>v.</i> - 999
— <i>v.</i> Nottingham	— <i>d.</i> Gibbard <i>v.</i> - 844
Journal and Others,	— <i>d.</i> Ginger - - - 336
(The Proprietors of,) - 1042	— <i>d.</i> Newman <i>v.</i> - 131
— <i>v.</i> Oxfordshire,	— <i>d.</i> Overton <i>v.</i> - 1039
(Justices of,) - - - 189	— <i>d.</i> Pitcher <i>v.</i> - 971
— <i>v.</i> Paget - - - - 946	— <i>d.</i> Powell <i>v.</i> - 548
— <i>v.</i> Polworth - - - 1048	— <i>d.</i> Smart - - - 340
— <i>v.</i> Quayle - - - 548	— <i>d.</i> Vincent <i>v.</i> - 34
— <i>v.</i> Radnorshire,	— <i>d.</i> Warwick,
(The Justices of,) - 90	(Earl of,) <i>v.</i> - - 714
— <i>v.</i> Scaife - - - 553	Roffey <i>v.</i> Shoobridge - 957
— <i>v.</i> Shrewsbury and	Rogers, <i>In re</i> - - - 926
Salop, (Justices of,) - 501	Ross <i>v.</i> Clifton - - - 356
— <i>v.</i> Sneyd and	— <i>v.</i> Clifton and Another 1033
Another - - - - 1001	— <i>v.</i> Jaques - - - 737
— <i>v.</i> Solley - - - 115	Rupallo, Bleaden <i>v.</i> - 857
— <i>v.</i> Spackman, <i>In re</i> ,	Russell, Holmes <i>v.</i> - 487
The Blandford Roads 1060	

TABLE OF THE CASES.

ix

S.

Sainsbury v. Thorp -	183
Salmon, Morison v. -	387
Salt and Witty, <i>Ex parte</i>	838
Salter, Purchell v. -	517
Sandy, Coates v. -	381
Saunderson v. Parker	495
Scaife, Regina v. -	553
Schelleter v. Cohen -	277
Schild v. Kilpin -	803
Scott and Another, Ive v.	993
Selden, Greenwood v. -	72
Senior, Wheeler v. -	270
Serle, Regan v. -	193
Shaw Alice, <i>Ex parte</i>	839
Sharpe, <i>Ex parte</i> -	513
Sharp v. Key -	770
Shield v. Twigg -	751
Shirer v. Walker -	667
Shoobridge, Roffey v. -	957
Shrewsbury and Salop, (Justices of,) Regina v.	501
Shuttleworth v. Cocker -	76
———, Cocker v. -	321
Simmons, Forbes, v. -	37
Slater v. Brookes -	349
—— v. Haines -	221
Smart, Parker and Another v. - - -	211
Smith, Archer v. -	99
—— v. Brandram -	430
—— v. Clark -	202
—— v. Davis -	50
—— Doe d. Williams v.	1011
—— v. Jennings -	155
—— v. Knowelden -	402
Sneezum v. Marshall -	267
Sneyd and Another, Re- gina v. - -	1001
Solly, Regina v. -	115
Solomon v. Leek -	361
Southern, Anderson v. -	994
Sowton, Briggs v. -	105
Spain v. Cadell -	745
Sparrow, Fellingham v. -	141
Spencer, Stephen, Swain v.	347
Spriggins v. White -	1000

Staite v. Haddon -	995
Stanley, Marriott v. -	59
Steele, Mondell v. -	812
Steinkeller, Towle v. -	1037
Steuart, M.P., Cassidy v. -	366
Stocombe, Hell v. -	339
Stone, Susan, <i>Ex parte</i> -	843
Sussex, (Justices of,) Re- gina v. - -	125
Swain, Pearce v. -	732
Swaine v. Stephen Spencer	347
Swinford, Nugee v. -	1038

T.

Tandy and Tandy, Arbi- tration, <i>In re</i> -	1044
Tatham, Trego v. -	379
Taylor, Regina v. -	600
Tebbs, <i>Ex parte</i> -	151
Tempest, Cocker v. -	306
Temple v. Keilly -	62
The Grand Junction Railway Company, Pickford v.	766
Thelwell v. Bennison -	739
Thomas v. Hawkes -	801
Thompson, Doe d. Clarke and Others v. -	948
—— v. Furney -	344
—— v. Gibson -	717
Thorne, Morgan, (an In- fant by his next Friend) v. - - -	226, 228
Thorold, Dixon v. -	827
Thorp, Sainsbury v. -	183
Thynne, Knight v. -	984
Tidd, Bell v. -	949
Titchmarsh, Greenway v. -	279
Topping v. Brown -	582
Towers v. Newton -	576
Trego v. Tatham -	379
Trevanion, Goodman v. -	328
Trinity House, Deptford Strond, (Corporation of,) Regina v. -	565
Tuck, Wortham v. -	335
Tucker, W., <i>In re</i> -	661

Tuddenham, Regina v. -	937	Welsh, Frazer v. -	754
Turquand and Others, Assignees of Vanderplank a Bankrupt v. Mose-		West v. Blakeway -	846
don - - - -	282	Westdale, James v. -	104
Turtle, Harris v. -	803	Wheatley v. Golney -	1019
Twigg, Shield v. -	751	Wheeler v. Senior -	270
		——— v. Wright -	729
		Whishaw v. Brown -	123
		White, Spriggins v. -	1000
		Whiteman, Barns and	
		Others v. -	181
		Wicks, Franks v. -	178, 489
		Wilkinson, <i>Ex parte</i> -	320
		Williams v. Andrews -	122
		——— v. Burgess -	544
		———, Harper v. -	618
		———, Jones, (Adminis-	
		trator of R. Jones,) v. -	252
		———, Jones v. -	702
		———, Mary, <i>Ex parte</i> -	72
		Winsor v. Herbert -	237
		Winter v. Campbell -	914
		Wilson v. Bailey -	18
		——— v. Blakey -	352
		——— v. Firth -	573
		Wilts, (Justices of,) Re-	
		gina,) v. -	524
		Woodcroft and Jones, (Ar-	
		bitration,) <i>In re</i> -	538
		Wood, Mackay v. -	278
		——— v. Morewood -	44, 669
		———, Regina v. -	310
		Woolner v. Devereux -	673
		Wortham v. Tuck -	335
		Wright v. Lewis -	183
		———, Wheeler v. -	729
		Wyatt v. Nicholls -	327
		Wybrow, <i>Ex parte</i> -	197
		Wynne v. Wynne -	396, 901
		———, Wynne v. -	396, 901

V.

Vale v. Ganter -	106
Vaughton v. Brine and	
Others - - -	179
Veal, Fox v. -	798

W.

Wainwright v. Gibson -	100
Waite v. Cook -	139
Wake, Watkins v. -	242
Walker v. Lumb -	131
———, Shirer v. -	667
Wallingford Union, (The	
Guardians of,) <i>Ex parte</i>	987
Ward v. Hall -	610
——— v. Lloyd -	213
Warne v. Haddon -	960
Watkins, <i>Ex parte</i> -	974
——— <i>Re</i> -	58
——— v. Wake -	242
Watson v. Frazer -	741
Wealds and Others, Daniels	
and Others v. -	44
Webb v. James -	314
Weedon v. Lipman -	111
Wells, Baker v. -	323
———, Everett v. -	424

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

COURT OF COMMON PLEAS.

Michaelmas Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

GWYNNE v. DAVY and Another.

1840.

THIS was an action of assumpsit, which came before the Court for argument upon a demurrer to the plaintiff's declaration. The declaration stated, that heretofore, and before the commencement of this suit, and before the making of the agreement hereinafter mentioned, to wit, on the 18th day of April, in the year of our Lord, 1838, by a certain indenture then made, between the said defendants, (therein described as wholesale and manufacturing chemists and druggists, and co-partners, trading under the firm of Davy, Mac-Murdo and Co.) of the first part, and the said plaintiff (therein described as a chemist) of the second part; and

The plaintiff declared in assumpsit, and the declaration recited a deed under seal, which had been entered into, for the performance of certain stipulated operations in chemistry, by the 21st of June, 1838, and which might be determined by the defendants, upon notice

given in case of the non-fulfilment of the contract by that time, and alleged a subsequent parol agreement between the parties extending the time for completing the contract to the 21st of December, 1838, but it contained no statement of the determination of the deed: *Held*, upon demurrer, that the action was wrongly conceived in assumpsit upon the parol agreement, and that covenant should have been brought upon the original deed.

1840.
Gwynne
v.
Davy
and Another.

which said indenture being in the possession of the said defendants, the said plaintiff cannot produce it now to the said Court here; after reciting, amongst other things, in manner following, that whereas the said defendants had carried on, and were then carrying on, the business of manufacturing chemists, at their factory in Great George Street, Bermondsey, and had for some time past been engaged in various experiments in the manufacture of sulphate of quinine, and other valuable chemical articles, which experiments had been made and conducted for them by the said plaintiff, who had also for some time then past had the general conduct, management, and superintendence of their said factory, and of the manufacturing processes there carried on, at a fixed salary; and that it was then believed that the said experiments in the manufacture of sulphate of quinine were nearly completed, and that such manufacture would afford considerable profit as the result of the improvements introduced into the same by the said plaintiff; and that it had theretofore been agreed between the said parties to the said indenture, to wit, the said plaintiff and the said defendants, that the said plaintiff should proceed to complete, at the said factory, his said experiments in the manufacture of quinine, and should have the general superintendence of the chemical, drug, and Galenical manufactory of the said defendants; and that he should well and sufficiently manage the same for the periods, and upon the terms following: that is to say, until the 30th day of June then next, at a weekly salary of 6*l.* per week, and from and after the said 30th day of June, then for the term of seven years, to be computed from that day, (determinable nevertheless as thereafter in the said indenture provided for) at the like weekly salary, with such additional commission, proportioned to the amount of the net profits to be realized to, or in the said manufactory, and to be calculated in the manner and on the principles thereafter in the said indenture in that behalf particularly specified. It was witnessed, that in pursuance and performance of the said

agreement, the said defendants did thereby, for themselves and each of them, their and each of their heirs, executors, and administrators, jointly and severally, covenant with the said plaintiff, his executors and administrators; and the said plaintiff did thereby, for himself, his heirs, executors, and administrators, covenant with the said defendants, their executors, administrators, and assigns, among other things, in manner following: that is to say, That the said plaintiff should have the management and conduct and superintendence of the said chemical, drug, and Galenical manufactory, from the day of the date of the said indenture, until the expiration of seven years, to be computed from the 30th day of June then next ensuing; and that the said plaintiff should not, during the continuance of the said contract, directly or indirectly, personally or by his advice, be engaged or assist in any similar manufactory, without the consent in writing of the said defendants; that the said plaintiff should be allowed and have all such facilities, materials, ways, and means whatsoever, for carrying on and prosecuting the said experiments, in the manufacture of sulphate of quinine at the said factory, as he had theretofore had and used; and that he should, to the best and utmost of his skill and ability, and without delay, proceed with and continue the said experiments, and complete and perfect the same; that the said plaintiff should receive and be paid weekly the sum of 6*l*, for every week during the continuance of the said contract, by way of fixed salary for his services therein, to be paid to him without any abatement or deduction for or upon any cause or pretence whatsoever; and the first payment thereof to be made on Saturday, the 21st day of April then instant, it being thereby acknowledged that all previous sums whatsoever due to the said plaintiff, for or on account of such salary or remuneration for his services in or about the said manufactory, had been duly paid and satisfied; that from and after the said 30th day of June, 1838, the said plaintiff should be entitled to, and should receive and be paid, in addition to the said weekly

1840.

GWYNNE

v.

DAVY
and Another.

1840.
Gwynne
v.
Davy
and Another.

salary or sum of 6% ; and as and by way of further salary or premium for his skill in conducting the said business of the said manufactory, an annual commission or sum, which should be equal to 33% 6s. 8d. per cent., upon the net surplus profits above the sum of 1000% which should be realised in any year of the said term of seven years, such surplus profits to be ascertained and estimated as thereafter in the said indenture is particularly mentioned ; and the first payment of the said annual commission or sum to be due, for or in respect of the year ending on the 30th day of June, 1839, and such annual payment thereof to be made without any abatement or deduction whatsoever, (except as thereafter provided for) within fourteen days after the accounts for the year should have been made up and signed, as thereafter in that behalf in the said indenture mentioned, &c. &c. ; that if the process for making sulphate of quinine should not be completed by and in regular operation upon the 21st day of June, then next ensuing, and producing on an average at the least forty-five ounces of good, merchantable sulphate of quinine, from 100 lbs. of yellow bark, of a quality as good as that then or lately produced at the said factory, (and of which a sample was intended forthwith to be taken by the said parties, and to be sealed by them respectively and marked with the letter B.) then the said defendants should, on and at any time after the said 21st day of June, 1838, have the power of determining the said contract by notice in writing, provided always, that if before the said defendants should actually have given or left such notice, the said plaintiff should have succeeded in completing such process, and bringing the same in such regular operation with such results as aforesaid, then the said power and condition should cease and be void to all intents and purposes whatsoever, &c. ; that if the said defendants, or either of them, should, on their or his part, or the said plaintiff should on his part refuse, fail or neglect to perform and fulfil any of the covenants, agreements, matters or things thereinbefore mentioned and expressed by them or him to

be performed and fulfilled, then and in every such case, the party so refusing, failing, or neglecting, should pay the said party the sum of 2000*l.*, as and by way of liquidated and ascertained damages, &c.; and whereas the said indenture having been so made as aforesaid, and the said plaintiff being so engaged in the management, conduct, and superintendence of the said chemical, drug, and Galenical manufactory of the said defendants as therein mentioned and engaged in such experiments as therein also mentioned, for the production of sulphate of quinine, the process for making sulphate of quinine therein mentioned, had not been completed by, nor was in regular operation, on the 21st day of June, 1838, in manner and form as in that behalf in the said indenture mentioned and appointed for that purpose, and thereupon afterwards, after the said 21st day of June, 1838, and before the commencement of this suit, to wit, on the 9th day of August in the year of our Lord, 1838, by a certain agreement then entered into between the said plaintiff and the said defendants, it was agreed in manner following, that is to say, "As Mr. George Gwynne (meaning the said plaintiff) has not yet succeeded in producing the 45 ounces of sulphate of quinine from 100 lbs of bark, as stipulated in the deed, (thereby meaning the said indenture above in this declaration mentioned) as executed by Charles Davy, and Edward L. MacMurdo, (thereby meaning the said defendants) and George Gwynne, (thereby meaning the said plaintiff) on the 18th of April, 1838, and as Messrs. Davy and MacMurdo (thereby meaning the said defendants) are desirous, and have proposed an experiment, in the course of a few days should be made, and minutely recorded by Charles Davy, (thereby meaning the said defendant, Charles Davy) on 200 lbs. of bark, in order to satisfy themselves what produce can be obtained, and as George Gwynne's (thereby meaning the said plaintiff's) assistance and instructions are essential for the completion of the above experiment, and as he is quite disposed to afford Charles Davy (thereby, &c.) every facility in his power,

1840.

Gwynne

v.

Davy
and Another.

1840.
Gwynne
v.
Davy
and Another.

provided he is protected against future injury ; it is hereby agreed that the period for the production of the 45 ounces of sulphate of quinine from 100 lbs of bark, as stipulated in the deed, (thereby meaning the indenture in the declaration above mentioned) executed, &c., on the 18th day of April, 1838, shall be extended to the 21st day of December, 1838 ;" and the said last-mentioned agreement having been so made as last aforesaid, afterwards, to wit, on the said 9th day of August, in the year 1838, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendants, had then undertaken and promised the said defendants to perform and fulfil the said last-mentioned agreement, in all things therein contained, on the said plaintiff's part and behalf to be performed and fulfilled, the said defendants undertook and promised the said plaintiff to perform and fulfil the said last-mentioned agreement in all things therein contained, on the said defendants' part and behalf to be performed and fulfilled ; and the said plaintiff avers, that from the time of the making of the said last-mentioned agreement, until and upon a certain day, to wit, the 12th day of October, then next ensuing, when the said defendants wrongfully broke the said last-mentioned agreement, as hereinafter mentioned, the said plaintiff well and truly performed the said last-mentioned agreement in all things therein contained, on the said plaintiff's part and behalf to be performed and fulfilled, and was ready and willing well and truly to have performed and fulfilled the said last-mentioned agreement, in all things in the said agreement contained to be by him performed and fulfilled, until the end and expiration of the said term, limited and mentioned, &c. ; and the said plaintiff, in fact, further saith, that although the said plaintiff entered upon and undertook the management, conduct, and superintendence of the said chemical, &c., manufactory, from the day in that behalf mentioned, &c., and continued in such management, &c., until the breach by the said defendants, of the said last-mentioned agreement and promise as hereinafter mentioned,

and was ready and willing to have continued such management, &c., during the continuance, and until the expiration of the said term of seven years, in that behalf in the said agreement named and appointed, to wit, &c. ; and although the said plaintiff was not, during any part of the time while he was so engaged in the said management, &c., directly or indirectly, personally, or by his advice, engaged, nor did he in any way assist in any similar manufactory ; and although the said plaintiff did, immediately upon his entering into such management, &c., to the best and utmost of his skill and ability, and without delay, proceed with and continue in the said experiments, &c., and was ready and willing to have gone on to complete and perfect the same ; and although the said plaintiff was, from the time of making the said last-mentioned agreement, until the breach thereof by the said defendants as hereinafter mentioned, ready and willing to prosecute and continue the said experiment for the production of 45 ounces of sulphate of quinine from 100 lbs of bark, so as that the process for the making thereof should be completed by, and in regular operation upon the 21st day of December, then next, and producing, on an average, at the least 45 ounces of good, merchantable sulphate of quinine from 100 lbs of yellow bark of the quality, &c. ; and although the said plaintiff did not in any way wilfully break or neglect to perform any of the conditions or terms of the said last mentioned agreement in that behalf above mentioned, &c., yet the said plaintiff saith, that the said defendants, not regarding their said promise and undertaking in that behalf, as aforesaid made, did not nor would perform, fulfil, and keep all things in the said last-mentioned agreement contained, on their part and behalf to be performed, fulfilled, and kept, but broke their said last-mentioned agreement in this, to wit, that they did not nor would, nor did nor would either of them allow the said plaintiff to have all such facilities, materials, ways and means for carrying on and prosecuting the said experiments in the manufacture of sulphate of quinine, &c. ; but on the con-

1840.

GWYNNE

v.

DAVY

and Another.

1840.
GWYNNE
v.
DAVY
and Another.

trary thereof, the said plaintiff saith, that the said defendants afterwards, and before the said 21st day of December, 1838, to wit, on the 10th day of October, 1838, removed, transferred, and carried away, and caused to be removed, &c., a large quantity, to wit, 1000 lbs weight of yellow bark from the aforesaid manufactory, where the same was then lying and being for the purpose of the said experiments by the said plaintiff, and wholly neglected and refused to restore the said bark, or any part thereof, or to provide the said plaintiff with other bark, instead of the said bark so wrongfully removed, &c., although the said defendants were requested by the said plaintiff so to do, and to enable the said plaintiff to resume his operations and experiments upon the said bark, for the purpose of obtaining such sulphate of quinine as aforesaid; and hindered and prevented the said plaintiff from using the materials provided for the purposes of such experiments and operations, and wholly deprived the said plaintiff of all facilities, materials, &c. necessary for carrying on such experiments; and the said plaintiff further saith, that the said defendants, further disregarding their said promise and undertaking, further broke their said last-mentioned agreement in this, to wit, that they would not, nor would either of them suffer or permit the said plaintiff to make the said experiment for the production of 45 ounces of sulphate of quinine from 100 lbs of bark as aforesaid, and would not permit and suffer him to continue in the prosecution of such experiment, until the day in that behalf in the said last-mentioned agreement bound and fixed, to wit, the 21st day of December, 1838, and would not furnish the said plaintiff with every or any means in the power of the said defendants, for bringing the said experiment to a successful issue by the day and year in that behalf last-mentioned, but on the contrary thereof, threw impediments and obstacles in the way of the said plaintiff's performance and prosecution of the said experiment, and wholly hindered and prevented him from going on with the same; and the said plaintiff further saith, that the said

defendants, further disregarding their said promise and undertaking, further broke their said last mentioned agreement, in this, to wit, that afterwards, and before the said 21st day of December, 1838, to wit, on the 12th day of October, 1838, they refused to allow the said plaintiff to continue in the prosecution of the said experiment, or to have the use of the materials, utensils, and machinery, or any of them, requisite for duly carrying on the same, or to have access to the said manufactory, and hindered and prevented him from having access to the same, and also hindered and prevented him from using the said materials, utensils, and machinery, or any part thereof, and wholly discharged and prevented him from the prosecution of the said experiment; and afterwards, without any just cause whatsoever, to wit, on the day and year last-aforsaid, refused to allow him any longer to proceed with his said experiment at their said factory or elsewhere, or continue in his situation; and wrongfully prevented the said process for the making of sulphate of quinine from being completed by, and in regular operation upon the said 21st day of December, and producing the quantity, &c.; and the said plaintiff further saith, that the said defendants, further disregarding their said promise and undertaking, further broke their said last-mentioned agreement in this, to wit, that although the said plaintiff was ready and willing to continue in the discharge of his duties under the said last-mentioned agreement and particularly in his experiments for the production of the said quantity of sulphate of quinine from the said quantity of bark, in the manner, &c., yet the said defendants hindered and prevented him from so doing, and did not nor would pay the said plaintiff the said salary, to wit, &c., agreed by them to be paid to the said plaintiff, until and upon the said 21st day of December, 1838; and the said plaintiff, in fact, saith, that by reason of the premises, and of the said defendants' wrongful conduct as above mentioned, the said plaintiff hath been wholly deprived of the means and opportunities of bringing the said experiments to a successful

1840.

Gwynne

v.

Davy

and Another.

1840.
Gwynne
v.
Davy
and Another.

issue, and was also hindered and prevented from bringing the same to a successful issue, by the time in the said last-mentioned agreement in that behalf specified and appointed, as the said plaintiff might and would have done, but for the said wrongful conduct of the said defendants, and has been deprived of divers large gains and emoluments, which he otherwise might and would have made, and has lost all the advantages of the said last-mentioned agreement, and of the salary, commission, emoluments, and profits, which he would have derived during the period of the continuance of the said last mentioned agreement, to wit, the space of seven years, in case he should have succeeded in producing the requisite quantity of sulphate of quinine, &c., by the day in that behalf named and appointed, as aforesaid; and the said plaintiff saith, that the said defendants have broken the said last-mentioned agreement, so made between the said plaintiff and the said defendants as aforesaid, and to keep the same or any part thereof have wholly failed, neglected, and refused, to the damage of the plaintiff of 3000*l.*, and thereupon he brings his suit, &c.

Special demurrer and joinder.

Peacock, in support of the demurrer. There were two grounds upon which the declaration was objectionable; the first arose upon the form of action which had been adopted, and which it was apprehended had been misconceived; and the second upon the insufficiency of the first breach alleged. First, as to the form of action which had been adopted. The plaintiff had erroneously brought his action in assumpsit, instead of in covenant. The declaration in its terms alleged an agreement to have been entered into, but admitted first the existence of a deed under seal, the breach of the provisions of which deed was that which was complained of. The effect of the agreement, which was a mere parol agreement, was only to prolong and extend the time, within which the matter, which was the subject of the covenants in the specialty, was to be completed; and

although that agreement might in its provisions be binding upon the parties, yet it would not control the original deed, but that deed still remained in full operation, and its covenants must be performed. The plaintiff, therefore, was bound to sue upon that deed, and the form of action had been misconceived. *Peacock* was proceeding to argue upon the second point, when the Court called upon

1840.
 GWYNNE
 v.
 DAVY
 and Another.

Warren, in support of the declaration. The plaintiff was right in bringing assumpsit on the agreement. It was a deliberate written contract, and although it was not under seal, it was perfectly binding upon the parties. The circumstance of its being disclosed upon the face of the agreement, and upon the declaration, that there had been a deed previously executed between the parties, had no effect, so far as regarded this action, and it was perfectly immaterial whether that deed still existed, or had been determined. The effect of the new agreement was to incorporate within it all the terms of the old deed, but, so far as this action was concerned, the existence of that deed was collateral and extrinsic matter only. The effect of the new agreement was to create a new understanding between the parties, and to place them in a new relative position, and at all events its provisions ought not to be thrown aside. The plaintiff, besides, could not have sued upon the specialty, but his remedy was upon the new agreement, or he had none at all. In *Tilson v. The Warwick Gas Light Company* (a), *Bayley, J.*, said, "I am not convinced by the case of *Atty v. Parish* (b), that where a contract appears on the face of a declaration, to be such that the plaintiff may recover, whether the contract be by deed or not, that it is necessary to declare on the deed, if there be one. The strong impression on my mind is that upon principle, although there be a deed between the parties, yet if there be a debt, independent of the deed, the account of which, however, is to be

(a) 4 B. & C. 963.

(b) 1 N. R. 104.

1840.
 GWYNNE
 v.
 DAVY
 and Another.

ascertained by the deed, the existence of the deed will not prevent the party from recovering the debt upon the common counts." That dictum of the learned Judge seemed entirely to meet this case. He also cited *Gleadon v. Atkin* (a), in a note to which case many decisions upon the point were collected, *Little v. Holland* (b), *Brown v. Goodman* (c), *Thompson v. Brown* (d), *Greig v. Talbot* (e), *Evans v. Thomson* (f), *Stephens v. Lowe* (g), *Bacon v. Simpson* (h), *Heard v. Wadham* (i), and *Rippinghall v. Lloyd* (k).

Peacock, in reply, was stopped by the Court.

TINDAL, C. J.—This case appears to me, on the objection taken, to be free from any doubt or difficulty. It is an action brought on an agreement, not under seal, supposed to have been made on the 9th of August, 1838, and the breach which is assigned is, that the agreement was broken by the defendants. The objection is, that it appears by the record, that there is an agreement under seal between the parties, which is not rescinded, but which is still in existence between the parties, and that is so. It appears that on the 18th of April, 1838, a deed was executed by these parties, by which the plaintiff was to be employed to perform certain operations, and in that deed there is a stipulation, that immediately after the 21st of June, 1838, if it is not seen that these operations are completed, not that the deed shall be void, but that the defendants shall have the power and authority to determine it, by a certain specific notice, and in the interval, before such notice is given, if the plaintiff is able to perform the operation, it is stipulated that then, and in that case, the power of determining the

(a) 2 Tyr. 593; 1 Crompt. & M. 410.

(b) 3 T. R. 590.

(c) Ibid. 592, n. (b).

(d) 7 Taunt. 656; 1 Moo. 358.

(e) 2 B. & C. 179; 3 Dowl. & Ry. 179.

(f) 5 East, 189.

(g) 9 Bing. 32; 2 Moo. & Sc. 740.

(h) 3 M. & W. 78.

(i) 1 East, 619.

(k) 5 B. & Ad. 742; 2 Nev. & M. 410.

deed shall be taken away. First, then, has this deed ever been determined? It was to continue for seven years. There is no statement that it has been determined by giving the notice; on the contrary, it is stated, on the face of the declaration, that the operations not having been completed by the 21st of June, and it being desirable that further experiments should be made, the time was extended to the 21st of December in the same year. The action is brought on the second agreement, which is not under seal, which it is said virtually incorporates all the terms and covenants of the original deed. But has it put an end to that deed, or is it still in force? I have read the terms of it, and it is clear to me that it is not by these terms that it can be said to be determined. The new agreement recites—"As Mr. Geo. Gwynne has not yet succeeded in producing the 45 ounces of sulphate of quinine from 100 lbs. of bark, as stipulated in the deed, as executed by Charles Davy, and E. L. MacMurdo and George Gwynne, on the 18th of April, 1838; and as Messrs. Davy and MacMurdo are desirous and have proposed that an experiment in the course of a few days should be made and minutely recorded by Charles Davy on 200 lbs. of bark, in order to satisfy themselves what produce can be obtained; and as George Gwynne's assistance and instructions are essential for the completion of the above experiment, and as he is quite disposed to afford Charles Davy every facility in his power, provided he is protected against future injury, it is hereby agreed that the period for the production of the 45 ounces of sulphate of quinine from 100 lbs. of bark, as stipulated in the deed, executed on the 18th day of April, 1838, shall be extended to the 21st day of December, 1838." According to my understanding of this agreement, it is simply an extension of the time; a covenant between the parties that the power to determine the deed should be extended to a more distant time; and I think that for anything contained in this agreement, the deed still exists. I cannot distinguish this case from those which have decided that where, by a deed, a matter is to be

1840.

Gwynne

r.
Davy
and Another.

1840.
Gwynne
v.
Davy
and Another.

done by a certain time, you cannot give in evidence an agreement to extend that time, unless that agreement be similar to the first, and is a deed under seal. Thus assuming, as it seems to be admitted by the learned counsel for the plaintiff, that this agreement cannot be given in evidence to release the terms of the deed, the judgment in this case must be for the defendants.

BOSANQUET, J.—This is an action on an agreement set out in the declaration, which states a previous deed under seal, containing a variety of stipulations; and the ground of the action is, that a breach of the parol agreement has been committed. The matter, of which the breach is alleged, is certainly not contained in the terms of the parol agreement, but, on the contrary, the terms of the breach are framed on the stipulations in the deed. Now the only question is, whether the true construction of the parol agreement is this—not merely that it is an enlargement of the former contents of the deed, in which the defendant is to have an option to put an end to the deed, or whether it is a new agreement, incorporating all the terms contained in the deed, making an agreement between the parties to the whole extent of that deed itself, and, consequently, that for the breach of any of the stipulations contained in that deed, the plaintiff is entitled to maintain an action on promises? It appears to me that this is nothing more than an agreement on the part of the defendants, that they will not enforce the option given to them by the deeds until a certain day. It is an agreement between the plaintiff and the defendants, and if either violate it he may be sued in an action in assumpsit for that breach of its terms, but that question now need not be inquired into. Then let us see what this agreement is: it refers to the deed expressly, and recites, that as the plaintiff has not yet succeeded in producing the required quantity of sulphate of quinine from the specified quantity of bark, and as it was desirable to continue the experiments on certain terms, which are spe-

cified, "it is hereby agreed that the period for the production of the 45 ounces of sulphate of quinine from 100 lbs. of bark, as stipulated in the deed, executed on the 18th day of April, 1838, shall be extended to the 21st day of December, 1838." That is the whole of the agreement, and can it be taken to be anything more than an agreement between the parties that the time shall be extended to a given day? It is impossible to say that it is anything more, and consequently the plaintiff is not entitled, in this action of assumpsit, to claim damages for a breach of the covenants of the deed.

1840.
 GWYNNE
 v.
 DAVY
 and Another.

COLTMAN, J.—This case, in my opinion, is one which is involved in very little doubt. The real question is, what does this agreement amount to? Looking at it, I cannot see anything in it which warrants us in saying that it embodies any other terms beyond that which it purports on the face of it to effect, and that is to postpone the time within which the notice must be given. If a breach has been committed of it by giving notice before the expiration of the time, it is to be considered whether an action lies in respect of it, but that is not the question here, and I think that this action is not maintainable.

MAULE, J.—I am also of opinion that assumpsit will not lie in this case, but I think that covenant would be the proper remedy. The deed does not contain any covenant on the part of the plaintiff at what time a certain result shall be produced, but the proviso is, that if by the 21st of June, 1838, a certain thing is not done, then, not that the agreement is to be at an end, but that it may be so, if the defendants think fit to give a notice. The defendants did not think fit to do so, and the deed was still in force between the parties. Then there is an agreement, extending the time for doing the act proposed to be done. The substance of that agreement is, that the time for the production of the

1840.
 GWYNNE
 v.
 DAVY
 and Another.

sulphate of quinine, as before stipulated for, shall be extended to the 21st of December, 1838. The effect of that is, as I apprehend, to say that by the deed the parties had the power, and still retain the power, to put an end to the deed by notice in writing; and that for a certain consideration they agree to abstain from exercising that power before the 21st of December, 1838. If they broke the agreement they might be liable to assumpsit for the breach of it, but the whole effect of the agreement is that which I have stated, and it leaves the matter complained of in this declaration as a cause of action under the operation of the deed, and not under the operation of anything else. I think, therefore, the demurrer is good, and that the defendants are entitled to judgment.

Warren subsequently applied for leave to amend.

TINDAL, C. J.—That cannot be done. I do not know how you could amend your declaration. You must bring a fresh action.

Judgment for the defendants.

NEWTON and Wife v. HARLAND and Others.

A witness, on being served with a subpoena, received 1s. only, as conduct money, that she went to the assize town, where the trial was to take

CHANNELL, Serjt., moved for an attachment against one Ann G., for not attending the trial of this cause, pursuant to a subpoena, which had been served upon her. The affidavit, on which the motion was founded, stated the service of the subpoena upon the witness, and the payment to her of 1s. at the time, but did not allege that any further

place, without making any further demand. On the morning of the trial, she refused to proceed to the Court-house, unless she received 9l : *Held*, that the plaintiff having made no tender to her of a reasonable amount for her expenses in going back, was not entitled to an attachment against her for disobedience to the subpoena.

1840:

NEWTON
and Wifev.
HARLAND
and Others. *

conduct-money had been given to her. It proceeded to state, however, that the witness had gone to York, where the trial was had, to lodgings which had been provided for her by the plaintiffs, where she partook of the board which had been prepared for her, but that on the morning of the trial, although a close carriage was brought to the door of the house, to convey her to the Court-house, distant only half-a-mile, she refused to go to the Court-house, unless a sum of 9*l.* was paid to her. The affidavit concluded by stating that the evidence of the said Ann G. was material to the plaintiff's case, and that she had been examined at two previous trials of the same cause. It did not, however, allege that any sum was tendered to her, on her demanding the 9*l.*, nor was it stated for what that amount was required by her. The case of *Edmonds v. Pearson* (a) was cited.

TINDAL, C. J.—It appears to me, that the general right of a witness is, that he shall have paid or tendered to him, a reasonable sum for going to and returning from the place of trial, and for his attendance there. The party may, if he thinks proper, waive that right, and in this case it appears, that the witness did waive all tender or payment, so far as her going to York went; but then comes the point, “how is she to go back?” and all that is stated is, that she demanded a sum of 9*l.* That may have been unreasonable; but I think that that demand having been made, it was incumbent on the plaintiff, who could only avail himself of her waiver up to that time, to make her a tender of some sort at all events.

BOSANQUET, J.—Assuming that the witness was not entitled to any farther sum for coming to the place of trial than that which she received, I think that the plaintiff was,

(a) 3 Carr. & P. 113.

1840.

NEWTON
and Wife

v.

HARLAND
and Others.

at all events, bound to tender her a reasonable amount to cover her expenses of going back.

COLTMAN, J., and MAULE, J., concurred.

Rule refused.

WILSON v. BAILEY, POTTER, and LEWIS.

The plaintiff sued three defendants upon a bill of exchange, for 49*l.* 14*s.* 6*d.* The contract upon which the amount of the bill accrued due was entered into, before the partnership of one of the defendants; but a part of the debt, the consideration of the bill, was incurred after the commencement of the partnership: *Held*, that the plaintiff was entitled to a verdict against all the members of the partnership for the amount of debt incurred subsequently to the commencement of the partnership.

THIS was an action brought to recover the sum of 49*l.* 14*s.* 6*d.*, being the amount of a bill of exchange, dated 18th February, 1838, drawn on and accepted by Bailey, Potter, and Co., and payable three months after date. The defendants, Bailey and Potter, suffered judgment by default; but the defendant Lewis pleaded, that at the time of the drawing of the bill, he was in partnership with Bailey and Potter; but that they had accepted the bill without his knowledge, for a debt due to the plaintiff before he became a partner, and that it was not accepted by them for anything connected with his partnership.

The cause was tried before *Coltman*, J., when it appeared that the amount for which the bill was drawn became due to the plaintiff from the firm of Bailey, Potter, and Co., in respect of the hire of certain horses and gigs, provided to that firm for the use of their travellers. The contract of hiring took place on the 29th August, 1837, but it continued up to the 18th January, 1838. The defendant Lewis became a partner on the 1st January, 1838, and a sum of 1*l.* 15*s.*, was claimed in respect of the hire of a horse and gig, during a period of a week between that time and the 18th. *Coltman*, J. directed the jury that the contract had been made by the old firm before the introduction of Lewis, and a verdict was taken for the defendant, the plaintiff obtaining leave to move to enter a verdict either

for the whole amount of the bill, or for the sum of 1*l.* 15*s.*

1840.

WILSON

v.

BAILEY,
POTTER
and
LEWIS.

Talfourd, Serjt. had obtained a rule nisi accordingly, against which

Wortley now shewed cause. The contract for the hiring of the horses and gigs was entered into antecedent to the partnership of Lewis; that contract was incapable of being divided, and, therefore, if the defendant was not liable for the amount alleged to have accrued due before his partnership, he could not be deemed liable upon it all. The bill, however, at all events, had been accepted in fraud of Lewis, as to all but 1*l.* 15*s.*; *Shirreff v. Wilks* (a). He also cited *Vere v. Ashby* (b), and *Wintle v. Crowther* (c).

Talfourd, Serjt., and *Wightman*, in support of the rule. As to the sum of 1*l.* 15*s.*, there could be no doubt that the defendant was liable; but the plaintiff was entitled to a verdict against him for the full amount of the bill, upon the pleadings as they stood. There was no plea that Lewis did not accept, but he should have alleged that the whole debt accrued before he became a partner, and have given proof of his plea. If that fact could be supposed to be pleaded, proof of it, at all events, had failed. The bill was drawn, it was evident, in pursuance of the partnership, and all the partners were liable upon it, and for its full amount. They cited *Howell v. Brodie* (a).

TINDAL, C. J.—The only question is, whether the special plea put on the record by the defendant Lewis is sustained. The plea is, that the bill of exchange, in the declaration mentioned, was drawn by the two defendants who have suffered judgment by default, and who are now partners with him, and that they accepted the bill without his know-

(a) 1 East, 48.

(c) 1 C. & J. 316.

(b) 10 B. & C. 288.

(d) 6 Bing. N. C. 44; 8 Scott, 372.

1840.

WILSON
v.
BAILEY,
POTTER
and
LEWIS.

ledge, for a debt which accrued due before the partnership, and for nothing relating to the partnership. The question is, whether that is true? The consideration for the bill was the hire of certain horses and gigs, and the contract was entered into in the August before the new partnership; but the time for which they were used extended over the partnership. The partnership commenced on the 1st of January, and it appears that part of the consideration was in respect of the use of a horse and gig between that day and the 18th January. Under these circumstances, the bill was accepted for 49*l.* 14*s.* 6*d.*, a great part of which was due before the partnership, but 1*l.* 15*s.* of which became due after the partnership. How then can the defendant put a plea on the record, which says that the whole of the debt was incurred before the partnership? That plea is not made out by the evidence, supposing it appears that the partnership commenced on the 1st of January, and there is evidence to shew that it did commence on that day. The effect of the plea, is, in substance, want of consideration for the bill. There is a want of consideration as to a part of it, but there is consideration for the remainder. It, therefore, seems to me, that the rule must be made absolute for entering a verdict for the plaintiff, on the issue on the special plea, for 1*l.* 15*s.*

BOSANQUET, J.—I am of the same opinion; the amount of the debt which accrued due after the commencement of the new partnership is 1*l.* 15*s.*; the rest was due from the old firm. I think that the plea is not made out, and that the plaintiff is entitled to a verdict against Lewis for 1*l.* 15*s.*

COLTMAN, J.—I am also of opinion that the issue was not rightly found for the defendant; but that he was liable to the plaintiff in the sum of 1*l.* 15*s.* There is evidence of a partnership from the 1st of January, subsequently to which this amount became due.

Rule absolute:

1840.

ARCHER, Gent., one &c., v. ENGLISH and WALKER.

THIS was an action brought by the plaintiff, to recover a sum of 44*l.* 12*s.* 4*d.*, alleged to be due from the defendants, for work and labour done by the plaintiff, as an attorney, for them, as trustees, for the benefit of certain persons, under a deed of assignment, alleged to have been entered into between one T. W. Richardson of the first part, the defendants of the second part, and certain other persons of the third part. The declaration contained a count for work and labour done, and the usual money counts. The defendants pleaded, first, that except as to 30*l.*, parcel, &c., they did not promise; and, secondly, as to that sum, a joint plea of payment into Court. The plaintiff joined issue upon the first plea; and as to the second plea, took the money out of Court, in part satisfaction of his demand, and prayed judgment for his costs. The cause was tried before *Coltman, J.*, at the Sittings for Middlesex, on the 13th of April, 1839, when it was proved that Richardson, being in insolvent circumstances, had applied to the plaintiff to arrange his affairs for him. A meeting of the creditors was called on the 17th of March, 1838, at which, the defendants attended, Mr. English acting as chairman. By a resolution, which was carried, it was determined that the meeting should be adjourned to the 22nd of the same month, when Mr. Archer should be prepared to produce a statement of the amount of composition, for which the insolvent could produce security. At the second meeting, Mr. English again acted as chairman, Mr. Walker being also present, and it was resolved that an assignment of the estate and effects of the insolvent should be made to Messrs. English and Walker, in trust, first to satisfy the costs and charges of preparing and executing the necessary instruments to effect the assignment; and

In an action of assumpsit against two defendants, the declaration contained an indebitatus count for work and labour, and the ordinary money counts; the amount claimed was 44*l.* 12*s.* 4*d.* The defendants jointly paid into Court the sum of 30*l.*, and pleaded that beyond that amount they did not promise: *Held*, that by that payment into Court, the defendants admitted their liability only as far as the 30*l.*, and were entitled to dispute their further liability.

Where the declaration is upon a special contract, and the defendant pays money into Court, that payment admits the whole contract.

1840.
 {
 ARCHER,
 Gent., &c.,
 v.
 ENGLISH
 and
 WALKER.

secondly, for the benefit of such creditors as should execute the same; and it was made a part of the resolution, that Mr. Archer should be requested to procure the same from the insolvent. The plaintiff obtained the execution of the deed of assignment, attended upon various hostile creditors, and performed other duties in connection with the affairs of the insolvent; the present action was brought to recover the sum of 44*l.* 12*s.* 4*d.* in respect of his services, from the commencement of the transaction. There was no proof given, at the trial, of the execution of the deed, by the defendant Walker, and the plaintiff failed also in shewing any connection between him and English, further than that proved by his attendance at the meetings of creditors. On behalf of the defendant Walker, it was urged that the payment into Court by him of the sum of 30*l.* admitted the contract only to that extent, and in no-wise pledged him to any responsibility beyond that amount. *Coltman*, J., left it to the jury to determine how far the defendants were liable, beyond the sum of 30*l.*, giving the defendant leave to move to enter a nonsuit, if they found a verdict for the plaintiff beyond that amount; first, a portion of the sum claimed appeared to be for business done, antecedent to the 22nd of March, upon which they would have to say, whether Mr. Archer had received any retainer from the defendants before that date; and, secondly, they would have to determine whether all the subsequent business transacted by him came within the provisions of the trust deed. The jury found a verdict for the plaintiff for 4*l.* 2*s.* 10*d.* over and above the amount paid in, negating the claim set up for the work done before the 22nd of March, 1838. In Easter Term, 1839,

Wilde, Serjt., moved, pursuant to leave reserved, to enter a nonsuit. He cited *Seaton v. Benedict* (a).

(a) 5 Bing. 28; S. C. 2 Mo. & P. 66 and 301.

J. Jervis and *Marshman* now shewed cause. *Blackburn v. Scholes* (a), and *Seaton v. Benedict* did not apply to the case. In the former, the question did not turn upon a joint payment, and the further joint liability of two persons. The decision was, that payment of money into Court, in *indebitatus assumpsit* for goods sold and delivered, after the delivery of a particular, stating that the action was brought for the price of a certain lot of goods sold to the defendant on a certain day, by A. B., the plaintiff's broker, did not admit that the goods purchased were the property of the plaintiff. In *Seaton v. Benedict*, the defendant was sued for goods supplied to his wife to the amount of 18*l.*; the defendant paid 10*l.* into Court, and the jury found for the plaintiff for the whole amount. The ground upon which a new trial was granted, was, that the articles were not necessities, and that the husband was only liable for debts contracted by his wife, on the assumption that she acted as his agent; and although there was an expression used by the Court to the effect, that too much stress had there been laid upon the fact of the payment of money into Court, the opinion given by no means went the length to which it was sought to be carried. The case besides, of *Ravenscroft v. Wyse* (b) was strongly in favour of the argument on behalf of the plaintiff. There, *indebitatus assumpsit* was brought by the master of a ship against three persons; the plaintiff proved a contract in the handwriting of one of them, signed in the name of the firm, by which he was engaged at a yearly salary, as master of a particular vessel; he also proved services for several years under the contract, and he then put in a rule for the payment of a sum of money into Court by the defendants, which, however, was not equal to the amount claimed. On the part of the defendants it was shewn that one of them was not a member of the firm, on whose account the contract had been signed, and was not an owner of the ship in question, but the Court

1840.

ARCHER,
Gent., &c.v.
ENGLISH
and
WALKER.

(a) 2 Camp. 341.

(b) 1 C., M. & R. 203.

1840.
 {
 ARCHER,
 GENT., &c.
 v.
 ENGLISH
 and
 WALKER.

held that the payment into Court by all the defendants generally, precluded them from denying the liability of one of them. It was admitted that *Stapleton v. Nowell*(a), and *Kingham v. Robins*(b), which were cases which had arisen since the rule nisi had been granted in this case, were opposed to the decision in *Ravenscroft v. Wise*.

Henderson, in support of the rule, was stopped by the Court.

TINDAL, C. J.—It seems to me, that we must hold ourselves governed by the law laid down in the case of *Seaton v. Benedict*, in the year 1828, which the Court of Exchequer once doubted, but to which, in two subsequent cases, that Court has returned as being good law. That is, that where an action is brought, with an indebitatus count, against two defendants, by each of whom money is paid into Court, that payment is only an admission up to the extent of the charge which the payment covers, and does not affect those other charges, which are not covered by it; and that where there is a special contract declared upon the payments into Court, admits that contract. That distinction fully warrants this rule being adopted, that where the count is general, the plaintiff must go on and shew that more is due, and that a contract exists, by which the defendants are chargeable beyond the money paid into Court.

BOSANQUET, J.—I am of the same opinion; and I think that there is no evidence of a joint liability on an indebitatus count, afforded by a payment into Court. If there had been any evidence of a joint liability, this application could not be acceded to, but as there was no such evidence, I think that it is a proper case for a nonsuit to be entered.

(a) *Ante*, vol. 8, p. 196; S. C.; 6 M. & W. 9.

(b) *Ante*, vol. 7, p. 352; 5 M. & W. 94.

The case was reserved upon the question of, whether there was any evidence offered of a joint liability, and as it is shewn by the cases which have been cited, that this payment into Court affords no evidence of such a joint liability, I think that the plaintiff should be nonsuited, and that this rule should be made absolute.

1840.
ARCHER,
Gent., &c.
v.
ENGLISH
and
WALKER.

COLTMAN, J.—The law on this point is settled, and in my opinion on very reasonable grounds, that where a party pays money into Court on an indebitatus count, he admits his liability on the contract alleged only to the extent of the sum which he pays in. It is a different case, when the money is paid in on a special contract, because there, it is naturally held that he admits his liability, as it is alleged on the face of the record. On the general count, he only says, that he has entered into some contract or other, on which he is liable ; but that does not make him liable on any particular contract.

MAULE, J.—I am also of opinion that this rule should be made absolute. The payment of money into Court admits the plaintiff's right of action on the count on which the money is paid in. If there is a special contract declared on, the defendant admits that by the payment; but if the count be a mere indebitatus count, then he admits only some contract, upon which the plaintiff is entitled to bring the action. What is stated here, is only that the defendant was indebted for work and labour, and in consideration of that work and labour, the defendants promised. The defendants, by a payment into Court, admit that they are indebted to the amount paid into Court, for some work and labour done, and for which the plaintiff is entitled to recover. It was formerly considered, that payment into Court was meant to apply to the contract declared upon, but I think that that was an erroneous opinion. The old expression, with respect to the payment of money into

1840.

ARCHER,
Gent., &c.,
v.
ENGLISH
and
WALKER.

Court, gives the proper effect of that payment; that the money shall be considered struck out of the declaration, and that the claim of the plaintiff, so far, shall be considered as if it had never existed at all, and the case shall go on, as if that had never been heard of. The effect of this rule being adopted, is, that parties are encouraged to pay money into Court. In this case, I am of opinion, that there was no evidence afforded, by the payment of money into Court, under the indebitatus count, of the joint liability of the defendants, and I think that this rule should be made absolute for a nonsuit.

Rule absolute (a).

(a) See *Armfield v. Burgin*, ante, vol. 8, p. 247.

The Bank of Australia v. The 20-11-85-204.

COWAN and Another v. BRAIDWOOD.

To an action of assumpsit, brought upon a decree obtained in the Court of Session, in Scotland, the defendant pleaded, that he was not, at the time of the commencement of the suit in that Court, or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of that Court, nor was he, at any time, before the pronouncing of the decree, in any manner, according to the course and practice of the said Court, notified, nor did he know of the proceedings, so that he might, by himself, his proctor, attorney or agent, appear, or plead, or in any way defend himself in the action, nor did he appear in or to any of the proceedings, whereby the decree was contrary to natural justice, and wholly inoperative and void against the defendant: *Held*, ill.

S.C. 2-Sept. 1840-1 May 1840.
THIS case came before the Court upon a demurrer to the plaintiffs' replication. It was an action of assumpsit, and the declaration alleged, for that whereas heretofore, to wit, on the 11th day of December, in the year of our Lord 1838, a certain decree was made and pronounced in and by the Court of our Lady the Queen, before the Lords of Council and Session at Edinburgh, in that part of the United Kingdom of Great Britain and Ireland called Scotland, in and concerning a certain action there depending in the same Court, at the instance of the now plaintiffs against the defendant, whereby the Lords of Council and Session aforesaid did then decree and ordain the defendant to make payment to the plaintiffs of a certain sum, to wit, the sum of 36*l.* 7*s.* 4*d.*, with the legal interest thereof, from the 30th day of August, in the said year 1838, until payment; and

the decree, in any manner, according to the course and practice of the said Court, notified, nor did he know of the proceedings, so that he might, by himself, his proctor, attorney or agent, appear, or plead, or in any way defend himself in the action, nor did he appear in or to any of the proceedings, whereby the decree was contrary to natural justice, and wholly inoperative and void against the defendant: *Held*, ill.

also to make payment to the plaintiffs of a certain other sum, to wit, the sum of 4*l*. 4*s*. 5*d*. ; and likewise to make payment to the plaintiffs of a certain other sum, to wit, the sum of 13*l*. 2*s*. 11*d*. , of expenses of process, as taxed by the auditor of the Court, together with a certain other sum, to wit, the sum of 2*l*. 3*s*. 7½*d*. , being the full dues of extracting that decree, as by the said decree remaining in the Court of Session at Edinburgh aforesaid, more fully appears, which said decree remains in full force, and wholly unsatisfied, whereby the defendant became liable to pay to the plaintiffs the said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, on the said sum of 36*l*. 7*s*. 4*d*. , according to the said decree, when he, the defendant, should be thereunto afterwards requested, and being so liable the defendant, in consideration thereof, afterwards to wit, on the said 11th day of December, in the year of our Lord 1838, aforesaid, promised the plaintiffs to pay them the said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, on request ; and whereas also the defendant heretofore, to wit, on the 1st day of January, in the year of our Lord 1839, was indebted to the plaintiffs in 100*l*. for money found to be due from the defendant to the plaintiffs on an account then stated between them ; and whereas the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, then promised the plaintiffs to pay them the last-mentioned sum or request, yet he has disregarded his promises, and has not paid any of the said monies in this declaration aforesaid, or any part thereof, to the plaintiffs' damage of 100*l*. , and thereupon they bring their suit. The defendant pleaded, first, non assumpsit ; secondly, the Statute of Limitations ; thirdly, that the decree was not made and pronounced in and by the said Court of Session, in and concerning the said action, modo et forma ; and fourthly, for a further plea in this behalf as to the said first count of the said declaration, the said defendant says, that he, the said defendant, was not at the time

1840.

COWAN
and Another
v.
BRAIDWOOD.

1840.
COWAN
and Another
v.
BRAIDWOOD.

of the commencement of the said action in the said first count of the said declaration mentioned, or at any time during the proceedings in the said Court of our Lady the Queen, before the Lords of Council and Session, in that Court also mentioned, in that part of the United Kingdom of Great Britain and Ireland called Scotland, or at any place within the jurisdiction of the said Court, in which the said action was so depending as aforesaid; nor was he, the said defendant, at any time before the making or pronouncing the said decree in the said first count mentioned in any manner, according to the course and practice of the said Court notified; nor did the defendant then know of the said several proceedings, or of any or either of them, so that he, the said defendant, could or might by himself, his proctor, attorney, or other agent, by him appointed and instructed in that behalf, appear or plead, or in any way defend himself in the said action then depending in the said Court, at the instance of the said plaintiffs, against the said defendant; nor did he, the said defendant, appear in or to any or either of the said proceedings, whereby the said decree so made and pronounced in the said Court of our Lady the Queen, was and is contrary to natural justice, and wholly inoperative and void against him, the said defendant, and all remedy thereon for the said several sums of money, for which the said decree was so made and pronounced, as in the said first count of the said declaration mentioned, was and is wholly lost to the said plaintiffs; and he, the said defendant, hath from the time of pronouncing the said decree, hitherto always resisted and impeached the said decree on that account, and they, the said plaintiffs, have not ever obtained the said several sums of money, or any or either of them, or any part thereof, which it is alleged, in the said first count of the said declaration, were decreed and ordained to the said plaintiffs; and the said defendant, in fact, further says, that the said decree being so contrary to natural justice, and wholly inoperative and void, still remains wholly unsatisfied, and without force or

virtue; and this he, the said defendant, is ready to verify, &c.

1840.

COWAN
and Another
v.
BRAIDWOOD.

Replication. As to the plea fourthly, above pleaded, the plaintiffs say that the defendant is a subject of our Lady the Queen, and was born within that part of the United Kingdom of Great Britain and Ireland called Scotland, and for a long time before the commencement of the action in the first count mentioned, was resident in Scotland aforesaid, to wit, at Edinburgh there, but the defendant, before and at the time of the issuing of the letters of arrest, must, and of the issuing of the summons and making the citation hereinafter mentioned, and from those times continually, hitherto was absent, and forth for Scotland aforesaid. The replication then went on to set out the proceedings in the Scotch Court, from which it appeared that the suit had been originally commenced against the defendant as security for the performance of certain conditions of a bond, entered into on the 30th of March, 1829, and having stated letters of arrestment *ad pundandam jurisdictionem* to have been issued against the defendant, upon which arrestments were subsequently used, together with the summons, and subsequent proceedings to this decree, which was made on the 11th of December, 1838, concluded as follows:—And the plaintiffs, in fact, say, that at the time the said bond in the said summons and decree mentioned, was made and entered into by the defendant, to wit, on the 30th day of March, 1829, he, the said defendant, was resident in Scotland aforesaid, where the said bond was made and entered into by the defendant, who then had, and from thence continually has had, and has certain real and personal estates within the said realm of Scotland. And the plaintiffs, in fact, further say, that by means of the said arrestments so caused to be used, and the said summons and citation done and performed, as in this replication aforesaid, the said Court, before the Lords of Council and Session had, by the law of Scotland aforesaid, and by force of the said act of Parliament (6 Geo. 4, c. 120), jurisdiction over the said

1840.

COWAN
 and Another
 v.
 BRAIDWOOD.

action, and that the said decree, made and pronounced as in the declaration mentioned, and as in this replication set forth, was and is, by the law of Scotland aforesaid, binding on the defendant, notwithstanding the said defendant was not in Scotland, or within the jurisdiction of the said Court, as in the said fourth plea is mentioned, and notwithstanding the other allegations, matters, and things in that plea appearing; and the plaintiffs in fact say, that the several sums of money in the first count of the declaration, mentioned to have been decreed and ordained to be paid to the plaintiffs, were and are justly and truly due, and payable by the defendant to the plaintiffs in manner in the said decree appearing. Verification.

Special demurrer, assigning for causes; that although the defendant hath in his fourth plea alleged certain matters of defence to the said cause of action in the said first count of the said declaration, which the said defendant contends are sufficient to defeat the said claim of the said plaintiffs in the first count of the said declaration mentioned, yet the said plaintiffs have not in and by their said replication confessed and avoided the said several grounds of defence, nor have they in or by their said replication traversed the same, but on the contrary thereof, the said plaintiffs have admitted the said several grounds of defence particularly mentioned and set forth in the said plea, and have attempted to put in issue facts which are altogether immaterial in the proceedings of this cause; and the said plaintiffs have in their said replication set forth therein a certain decree, obtained in the Court before the Lords of Council and Session in Scotland, which said decree, for anything that appears, is another and different decree than that set forth in the first count of the declaration; and also for that it appears, in and by the pleadings in this cause, that the said plaintiffs had not any right of action which can be enforced against the said defendants by the laws of this country; and also for that the said plaintiffs have in their said replication departed from the said cause of action in the first count of

their said declaration mentioned, and have thereby attempted to put in issue another and different decree than that declared upon; and also for that the said replication of the said plaintiffs to the said fourth plea of the said defendant is in other respects uncertain, informal, and insufficient. Joinder.

1840.
 COWAN
 and Another
 v.
 BRAIDWOOD.

Ogle now appeared to support the demurrer. [*Tindal*, C. J.—The question will turn upon the plea; the sufficiency of which must be supported.] The plea was sufficient in alleging, that the defendant was not within the jurisdiction of the Court, in which the decree was granted, and that he was neither served with process, nor had appeared to defend the suit. *Buchanan v. Rucker* (a), distinctly decided, that an action would not lie on a foreign judgment, when it appeared that the defendant was not resident within the jurisdiction of the foreign Court, and was not served with process, although the proceedings were had according to the practice of that Court. The circumstances alleged in the plea, were sufficient to shew that the decree in this case was contrary to natural justice and common sense, and the Court would not conclude the defendant from disputing a foreign judgment when such was the case. [*Coltman*, J.—Is not the allegation that the decree is contrary to natural justice, and, therefore, wholly inoperative and void, the result of a conclusion of law founded on the previous statements, rather than a distinct allegation?] It amounted to a positive allegation, and natural justice being opposed to the decree, assumpsit would not lie upon it. [*Bosanquet*, J.—In *Buchanan v. Rucker*, the defendant had never been in Tobago, where the judgment was obtained, upon which the action was brought.] Nor did it appear, on the face of the pleadings in the present case, that the defendant was ever in Scotland. [*Tindal*, C. J.—The plea does not say that he was not at any time in Scot-

(a) 1 Camp. 63.

1840.

COWAN
and Another
v.
BRAIDWOOD.

land, but only that he was not there during the time of these proceedings. That does not shew that he was never there, but seems rather to imply the contrary.] It must be admitted that the great difficulty under which the defendant laboured, was to distinguish this case from the case of *Douglas v. Forrest* (a). That was an action on a Scotch decree, to which the defendant pleaded non assumpsit, and it was proved on the trial, by an advocate of the Scotch Courts, that by the law of Scotland, the Court of Session might, after such proclamations, as were mentioned in the decree, had been made, pronounce judgment against a native Scotchman, resident in Scotland, who had heritable property in that country, for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time. There the defendant lived in Scotland at the time of the debt, which was the subject matter of the decree, was contracted; and that was one of the ingredients in the case, upon which the Court arrived at the conclusion that the action should be supported; but the replication here contained only an allegation, that the defendant was resident in Scotland at the time the bond, which formed the subject of the action, was entered into, and he was only a surety under that bond. *Hall v. Odber* (b), and *Smith v. Nicholls* (c), shewed that the defendant was not estopped from disputing the decree. The first case decided that the plaintiff, although he had obtained a decree in his favour in a Scotch Court, was at liberty to waive that decree, and proceed on the original cause of action in an English Court, and in the latter case it was held, it being attempted to set up a judgment in the Vice Admiralty Court of Sierra Leone, as an estoppel to proceedings here, that the judgment of that Court did not merge or extinguish the original cause of action. The

(a) 4 Bing. 686; S. C. 1 Mo. & P. 663.

(b) 11 East, 118.

(c) 5 Bing. N. C. 208; S. C. 7 Scott, 147; *Ante*, vol. 7, p. 283.

right of the defendant to dispute the decree, as having been improperly obtained, by reason of its being granted in his absence, and without due notice to him, being therefore apparent, the onus of alleging those facts, which were proved in *Douglas v. Forrest*, fell on the plaintiff; and the declaration containing no such allegations, the plea must be taken to be good, and to afford a sufficient answer to it. The plea stated distinctly, that the defendant was not in Scotland, or in any place within the jurisdiction of the Court, during the proceedings; that he was not, before the making of the decree, in any manner, according to the course and practice of the Court, notified of the proceedings; nor did he know of them, so that he could, by himself or his proctor, appear or plead, or in any way defend himself in the action, nor, in fact, did he appear. The result of this was, that the whole proceedings took place in his absence, and without his knowledge, and that the decree was, therefore, as it was stated, contrary to natural justice. The defendant, therefore, was entitled to judgment.

1840.
 COWAN
 and Another
 v.
 BRAIDWOOD.

Rawlinson, for the plaintiff, was stopped by the Court.

TINDAL, C. J.—It appears to my mind, that this plea is insufficient, and that the effect of the plea and the replication added to it, is to bring before the Court the re-hearing of the case of *Douglas v. Forrest*, with which in substance and effect this case agrees. The declaration is in the usual form, and sets up a decree of a Scotch Court, and the form being that which has been adopted from the earliest times, I cannot suppose that any objection can exist to it, or can now be taken. Is there then enough on the plea to shew that the decree is not binding on the defendant? In bringing such a plea before the Court, the defendant should have put in allegations, which would have brought this case within the reach of those decisions which have been pronounced upon the subject of foreign judgments. But, there is no statement that he was not resident in Scotland during the

1840.
 {
 COWAN
 and Another
 v.
 BRAIDWOOD.

time of these proceedings, nor that he was not liable to the laws of Scotland during the time of these proceedings, nor is there any such allegation as formed the subject of strong objection in *Douglas v. Forrest*, that he had no property or house in Scotland, for in case he had any such, it is reasonable to suppose that some one would have come forward to defend him. Then there is no statement that he had no knowledge or notice of these proceedings. In a very technical manner, indeed, he says, that they were not notified to him, according "to the course and practice of the Court;" that is, that he had no such notice, as according to strictness and propriety he should have had, but that is very far from alleging that he had no thorough or complete notice of the proceedings. The plea then goes on to say, that the defendant had no notice of the proceedings so as he might "by himself, his proctor, attorney, or other agent, by him appointed and instructed in that behalf, appear or plead, or in any way defend himself in the said action," still leaving it open that he might have had notice, and that he might have applied to the Court. It seems, therefore, to me, that this plea, which should be good in omnibus, as the party is *primâ facie* bound by it, is deficient in these particulars, and being so, we are not called upon to look at the replication, but to give judgment for the plaintiff.

BOSANQUET, J.—I am also of opinion that this plea is not a sufficient answer to the declaration. The declaration is framed in the usual way and according to the ordinary practice, and it has not been hitherto found necessary to introduce any particular circumstances to make the decree available in England. Then the plea sets up, that this is a decree contrary to natural justice, and, therefore, inoperative and void. This is not an allegation which is traversable; it is only a conclusion, that from certain matters appearing on the plea, the decree is inoperative. That it is a decree contrary to natural justice is a conclusion of law, and if it is contrary to natural justice for the reasons stated, that may be a cause for holding it void. Then what are the

grounds upon which this conclusion is formed? They are, that at the time of the commencement of the suit, upon which the decree was given, and during its progress, the defendant was not in Scotland. There is no allegation, however, that he was not domiciled there,—that he had no property there,—that he was not a natural born Scotchman, nor of any of those circumstances which were particularly adverted to in *Douglas v. Forrest*; nor does it negative his knowledge of the sentence and decree. In a very technical way it does say, that the proceedings were not notified to him according to the practice of the Court; but that is not inconsistent with his having had notice, although that notice may have been irregular. Then the plea goes on a little further, and says, that the defendant did not know of the proceedings, or any of them, so that he could appear and defend himself either personally or by his proctor. If he meant to depend upon this allegation, it should have been made in very different terms. On these grounds, therefore, it seems to me, that the defendant has not stated sufficient reasons for the conclusion which he draws; and, without deciding upon the replication, I think that we must hold the plea to be bad, and that the plaintiff is entitled to our judgment.

1840.
 }
 COWAN
 and Another
 v.
 BRAIDWOOD.

COLTMAN, J.—The allegation in this plea, “whereby the said decree, so made and pronounced in the said Court of our Lady the Queen, was and is contrary to natural justice, and wholly inoperative and void,” certainly appears to me to amount to nothing, unless the preceding allegations shew what is meant. It is quite consistent with this plea, that the defendant was domiciled in Scotland at the time of the suit, and although the strict rule may not have been complied with in giving notice of the proceedings, yet that may have been sufficient notice according to the substantial justice of the case. Then as to the allegation that the defendant did not know of the proceedings, that may be quite true; but yet he may have had all the benefits that

1840.
COWAN
and Another
v.
BRAIDWOOD.

natural justice requires. It appears, therefore, to me, that the party is bound to make out a good defence in omnibus, and that the defendant does not make out a sufficient case.

MAULE, J.—I also think that this plea is bad. The declaration is in the ordinary form, and it states a good consideration for the promise alleged, and the plea ought to state something in answer to it. The answer which is set up is, that the decree, which formed the consideration of the promise, is a voidable decree, and in order to shew that it is so, he should either shew that it is not a binding decree in Scotland, which he does not affect to do, or that which he does affect to do, to shew that it was not binding here, as being contrary to natural justice, and as being contrary also to the case of *Buchanan v. Rucker*. But I do not think that he does so: because the Courts at Westminster Hall, in sustaining actions on judgments of foreign Courts, against absent persons, have decided that in their opinion a decree is not contrary to natural justice, although the party may be absent. So here, the allegation of the party not having notice, will not of itself shew the decree to be contrary to natural justice, and that there is no ground for an action of assumpsit. Then here is a declaration, which sets up a decree of a Scotch Court; and then there is a plea, which does not necessarily shew that there was no good consideration for it, or that it is void. Therefore the plea does not afford a sufficient answer to the declaration. It should shew, that under no circumstances can the decree be sustained. It ought not to select some circumstances and leave out others, which might make it good in one case and not in another. The plea is, therefore, bad. In saying this, however, the Court does not touch upon the decision in *Buchanan v. Rucker*, but it merely sustains the law, that where the declaration is good the plea must contain matter which makes it inconsistent with the declaration.

Ogle then applied for leave to amend.

TINDAL, C. J.—The probability is, that if we grant leave to amend, the defendant will traverse the decree, which will bring in some very expensive evidence. There is nothing stated to induce the Court to suppose that the defendant has merits, and we cannot accede to the application.

1840.
COWAN
and Another
v.
BRAIDWOOD.

Judgment for the plaintiff.

FORBES v. SIMMONS.

STEPHEN, Serjt., shewed cause against a rule, obtained by *Bompas*, Serjt., for entering a suggestion on the record under the Middlesex County Court Act, (23 Geo. 2, c. 33) for costs, less than 40s. having been recovered on the trial of the cause. It was an action brought by the plaintiff, to recover the sum of 2*l*. 1*s*. 6*d*., for goods sold and delivered; to which the defendant pleaded, never indebted; the cause was tried before the under-sheriff, when evidence was given that goods to the amount of 3*s*. 3*d*. had been returned before the commencement of the suit. A verdict for 1*l*. 18*s*. 6*d*. only was therefore returned, and it was sought, upon this fact, to bring the case within the operation of the statute. It was objected, that where the cause was tried before the sheriff, the rule laid down in the 19th section of the statute did not apply. That section referred to "any action of debt, or action upon assumpsit, commenced or prosecuted in any of his Majesty's Courts of record at Westminster." That could not be taken to refer to the Court of an under-sheriff. [*Erskine*, J.—The case of *Bishop v. Marsh* (a) has already decided that point. *Wells v. Langridge* (b), and *Turner v. Barnard* (c), are to the same point.] The

An application to enter a suggestion on the roll under the Middlesex County Court Act, for costs, may be made as well in a case tried before the sheriff, as a case tried in one of the superior Courts.

(a) *Ante*, vol. 8, p. 1; S. C.
6 Bing. N. C. 12.

(b) *Ante*, vol. 5, p. 509.
(c) *Ibid*. p. 170.

1840.
 FORBES
 v.
 SIMMONS.

cases of *Jones v. Barnes* (a), and *Pritchard v. McGill* (b), had a contrary tendency.

Bompas, Serjt., in support of the rule, cited *Thom v. Chinnock* (c), where the same objection was taken by his learned brothers, but failed.

TINDAL, C. J.—I think the case of *Bishop v. Marsh* is decisive.

Rule absolute.

(a) 2 M. & W. 313; S. C. *Ante*, 5, p. 731.
 vol. 5, p. 455. (c) *Ante*, vol. 8, p. 585; S. C.
 (b) *Ibid.* 380; S. C. *Ante*, vol. 1 Scott, New Rep. 138.

ARCHER v. BRINDLEY.

The affidavit in support of an application for a distringas, stated the requisite number of calls and appointments to have been made, but set forth that at the second call, the deponent was informed that the defendant had been away from home for five weeks, and also, that upon inquiry in the neighbourhood, he had learned the same fact, as well as that the defendant was believed to

CHANNELL, Serjt., moved for a distringas. From the affidavit it appeared, that the writ of summons had issued on the 2nd of October, in the present year. In the months of August and September, letters had been addressed to the defendant, at his residence, where he carried on the business of a surgeon, but no answers had been returned to them. Since the issuing of the writ of summons, every means had been employed to procure its service. The deponent stated that he had called at the house of the defendant on the 26th of October, and was informed that he was not at home; that he made an appointment for the next day, and that then, on his calling, he was informed by another person, that he was still away from home, and that he had been away for five weeks. [*Tindal*, C. J.—That is perfectly compatible with his being abroad]. The other calls and appointments were then made and kept, but with no success.

be out of the way, to avoid service of a writ of execution in another action: The Court granted the distringas, although it was possible, that from the length of time during which the defendant had been absent, he had not heard of the proceedings.

Inquiries were subsequently made at the house of a chemist in the neighbourhood, who usually made up the medicines of the defendant, and the deponent was informed by the chemist, that he had not seen the defendant for several weeks, and that he believed that he was out of the way. The difficulties were, first, that it was quite possible, from its being stated that the defendant had been out of the way for five weeks, that he had never heard of these proceedings; and secondly, that there could be no allegation made that he was out of the way to avoid service of process in this action. It was believed that he was out of the way to avoid service of a writ of execution in another suit.

1840.
 {
 ARCHER
 v.
 BRINDLEY.

TENDAL, C. J.—You may take the *distringas*. If there be any grounds for the application, the defendant may come to the Court to set it aside.

Rule granted.

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 LEGGE v. BOYD.

THE *Solicitor General* moved for a rule, calling upon the plaintiff to shew cause, why the defendant should not be allowed to plead a special plea, besides the plea of the general issue, by statute. It was an action brought by the owner of certain tobacco, against the collector of customs duties at Torbay; and the question involved in the cause, was, whether the plaintiff was entitled to call upon the defendant to sign a document, to enable him to obtain his tobacco, upon the payment of certain reduced duties, by reason of its having been damaged in consequence of being wrecked? Two questions arose upon the subject matter of the action. It appeared that the tobacco had been landed in London, and had been warehoused, but under the provisions of the Warehousing Act, it had been re-shipped for the purpose of being conveyed to Londonderry. On the voyage to that

A plea of the general issue "by statute," is within the meaning and operation of the rules of H. T., 4 Wm. 4, and the Court will not suffer the defendant to put it on the record, together with a special plea raising the same grounds of defence.

1840.

LEGGE

v.
BOYD.

place the ship in which it had been placed was run into by another vessel, and the damage which she sustained was deemed to be so serious, that her crew abandoned her. She did not, however, go down, but drifted on shore at Torbay, where she was secured by salvors, by whom the tobacco was delivered to the officers of customs at that place. First, the question arose, whether the action would lie against the defendant? And secondly, whether the tobacco was wrecked tobacco within the meaning of the act, by which circumstance it would be liable to a decreased amount of duty only; its importation to the port of London having already taken place. *Barry v. Arnaud* (a) was a case which had arisen upon the act. The object was to put this defence on the record, in order to raise the questions upon demurrer, but the defendant was desirous of retaining also his defence of the general issue by statute. The case had been before *Erskine, J.*, at Chambers, who had refused the order sought for, upon the authority of the cases of *Neale v. McKenzie* (b), and *Fisher v. The Thames Junction Railway Company* (c). The object of the provisions of statutes in giving the plea of the general issue to defendants, was to grant them a boon, and it was never intended, when that plea was given, to take away the general right which they possessed to plead any special circumstances. The two cases, to which the learned judge had referred at Chambers, had both been decided before the rule of T. T., 1 Vict. (d) had been promulgated.

Channell, Serjt., on a subsequent day, shewed cause. It was not within the intention of the statute to allow the statutable plea of the general issue to be pleaded, in addition to a special plea. The learned judge had allowed the plea of the general issue to be put upon the record, but had refused to allow the words, "by statute," to be employed

(a) 2 Perry & Dav. 633.

(b) 1 C., M. & R. 61.

(c) *Ante*, vol. 5, p. 773.(d) *Ante*, vol. 6, p. 649.

in connection with it. The effect of allowing those words would be to enable the defendant to raise all the defences which were given by the statute under it, although the same defences were raised by the special plea. That was not within the intention of the statute, by which the plea of the general issue was given, and was, besides, in direct contravention of the terms of the rule of H. T., 4 W. 4 (a). The recent rule of T. T., 1 Vict. had no effect upon this case. The decisions in the two cases of *Neale v. McKenzie*, and *Fisher v. The Thames Junction Railway Company* were still legally applicable to it.

1840.

LEGGE

v.

BOYD.

The *Solicitor General* and *Ellis*, in support of the rule. Rules of Court, when opposed to the express meaning of acts of Parliament, must be deemed to be void. Here, the terms of the statute, which allowed the plea of the general issue to be put on the record, with a certain effect, were positive and distinct, and no rule could have the effect of depriving the defendant of the right which was conferred upon him. The object of the defendant, in putting the special plea on the record was, by securing a quick means of disposing of the case, to save the public time, but he was desirous not to sacrifice the advantages afforded him.

TINDAL, C. J.—If this had been *res integra*, I should have felt considerable doubt, whether the special plea, desired to be put on the record, as well as the plea of the general issue, would have fallen within the rule of Court which regulates the putting different pleas on the record; although, certainly, the object and effect of that rule is to prevent the lengthening of the record by the pleading of various pleas, having reference to the same subject matter of defence. I cannot help perceiving, however, that this is a motion made to the Court under the Statute of Anne; and

(a) *Ante*, vol. 2, p. 312.

1840.

LEGG
v.
BOYD.

we must consider how that statute has been dealt with since the new rules. *Neale v. MacKennis* seems to me to shew, that in cases where the parties who think fit to avail themselves of the advantages arising from pleading the general issue, by which all matters of defence under the act are let in, the course has been not to allow them to plead the special matters. In that case it was held, that where a defendant may, by statute, give matter of justification in evidence under the general issue, he will not be permitted to plead the general issue, and also a special plea of justification. I do not feel that any difficulty arises upon the later rule; but the case still brings us back to the question, what is the sound construction of the statute of Anne? It seems to me, that if the party has availed himself of the advantages proceeding from pleading the general issue, he should not also be allowed to plead specially.

COLTMAN, J.—I quite agree with the opinion expressed by my Lord Chief Justice. The object of the statute of Anne was to enable parties, by the leave of the Court, to put various defences on the record; but at the same time, where he would have a full opportunity for defence afforded him under the general issue, I do not apprehend that it was meant that he should be allowed to plead additional special pleas unnecessarily. It was formerly the practice, under that statute, to allow several pleas to be pleaded without inquiry; but that being found to be an erroneous policy, the Courts have, under the rules which have been promulgated, refused to allow that practice to continue; and in the cases which have been cited, it has been held, that parties availing themselves of the statutable plea of the general issue, shall not also be permitted to set up the same matter of defence at length.

MAULE, J.—I think also that this rule should be discharged. The statutes which provide that the general issue

may be pleaded, and the special matter given in evidence under it, comprehend all the powers of the statute of Anne; not in form, certainly, but in effect, and according to my opinion, were intended to be substituted for it. I think that in this case, the defendant should not be allowed to plead both pleas, and that the rule should be discharged.

1840.
 LEGGE
 v.
 BOYD.

Rule discharged.

Doe dem. VINCENT v. ROE.

CHANNELL, Serjt., moved for judgment against the casual ejector. The declaration was erroneously entitled, as of "Trinity Term, in the fourth year of the reign of Queen Victoria," a term which had not yet arrived. The case of *Doe dem. Gowland v. Roe* (a), shewed that the application must be unsuccessful; but in *Doe dem. Wills v. Roe* (b), *Patteson*, J., held, that as there was a date affixed to the notice at the foot of the declaration, as well as the title, the tenant could not have been misled, and that the service must be taken to be good. Here, there was no date, but it was sworn that the service had been effected on the 29th October, which might be taken to place the case on the same footing as that cited, for the tenant could be under no mis-apprehension, as the notice required him to appear in "next" Michaelmas Term.

A declaration in ejectment, being entitled as of "Trinity Term, in the fourth year of the reign of Queen Victoria," instead of the "third year:" Held, irregular, and the Court refused to allow judgment against the casual ejector to be signed, although it was sworn that service was effected on the 29th of October, with notice to appear in the "next" Michaelmas Term.

TINDAL, C. J.—The rule must be refused. Parties should be more regular in their proceedings.

Rule refused.

(a) *Ante*, vol. 5, p. 273.

(b) *Ibid.* p. 380.

1840.

DANIELS and Others v. WEALDS and Others.

A cause was referred to an arbitrator, the costs of the suit being directed to abide the event of the award.

The award was in favour of the defendant, who taxed the costs of the cause, which the plaintiff had neglected to pay. The Court granted a rule for an attachment absolute in the first instance.

CHANNELL, Serjt, moved for an attachment against one of the plaintiffs in this action, for not paying the costs, pursuant to the award of the arbitrator, and of the Master's allocatur. The cause had been referred to an arbitrator, and the agreement of reference directed, that the costs of the cause should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator. The award was in favour of the defendant, and directed each party to pay his own costs of the reference. The costs of the cause had been taxed by the defendant, but the plaintiff had neglected to pay them. The question was, whether the rule was absolute in the first instance; as it might be inferred from the case of *Ex parte Townley* (a), that the defendant was entitled to a rule in those terms.

The COURT granted a rule absolute.

Rule absolute.

(a) *Ante*, vol. 3, p. 39.

WOOD v. MOREWOOD.

The Court will not order a party to permit his opponent in the cause to inspect and take a copy of a deed of conveyance, with a view only to the discussion of a rule for a new trial.

M. D. HILL moved for a rule, calling upon the defendant to shew cause, why the plaintiff should not be permitted to inspect and take a copy of a deed of conveyance of certain property, the right to which was a subject of dispute in this cause. The cause had been already tried, but a rule nisi for a new trial had been obtained by the defendant. The object of the present motion was, that a copy of the deed should be in the hands of the plaintiff, upon the argument

upon the rule which had been granted, with a view to its sufficiency being ascertained.

1840.
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 Wood
 v.
 MOREWOOD.

The *Solicitor General*, on the part of the defendant, was prepared to furnish a copy of the deed for the use of counsel in the cause.

TINDAL, C. J.—These applications are very often made in cases where a trial is coming on; but I do not recollect such a motion as the present, antecedent to the discussion of a rule for a new trial. The deed will, of course, be in Court on the day when the rule is discussed; and then, if there is any surprise, the plaintiff shall have a further day to consider the question. The question is now, however, whether you are regular in your motion; and I think you are not.

Rule refused.

DAVIES v. JENNER.

CHANNELL, Serjt., moved for a rule, calling upon the defendant to shew cause, why the notice of declaration in this cause, and all subsequent notices, should not be deemed to be duly served, by their being stuck up in the Master's office.

Semble, that the Court will not grant a rule permitting the service of notices in the cause, by sticking them up in the Master's office, in reference to more than the immediate notice sought to be served.

MAULE, J.—Can you make an application to the Court, the effect of which will be prospective, with regard to the service of any rules or notices in the cause?

Channell, having conferred with the Master, said, that he was informed that he could not obtain the rule in the form in which he had applied for it, but with reference only to the notice of declaration now about to be served. (a)

The rule was granted, upon grounds stated to the Court.

(a) See *Layton v. Mason*, ante, vol. 6, p. 275.

1840.

Re PEARSALL.

An affidavit, verifying the certificate of an acknowledgment made by a married woman under the Fines and Recoveries Act, (3 & 4 Wm. 4, c. 74,) made by a notary public, at Carlsruhe, the commissioner taking the acknowledgment having declined to make an affidavit: *Held*, sufficient.

THE *Solicitor General* moved, that a direction might be given to the proper officer, to receive an affidavit, verifying the certificate of acknowledgment of a married woman, under the Fines and Recoveries Act (3 & 4 W. 4, c. 74). The affidavit was not made by a practising attorney, pursuant to R. G., H. T., 4 W. 4. The married woman lived at Carlsruhe, in Germany, and her acknowledgment was taken before a commissioner, who had declined to make an affidavit, because, being at the head of the department of notaries public, he deemed it to be unbecoming to him, and inconsistent with his position, to make an affidavit before a person, who derived his authority from him. One of the notaries public had made the affidavit. *Re Scholfield* (a) was cited, and it was urged that the affidavit was sufficient, a notary public being an officer equal in rank with an attorney.

TINDAL, C. J.—I think that this is a case in which, if any person, not of the particular rank named in the rule of Court, can make an affidavit, the notary public is such a person. He is an officer of equal rank and station with a practising attorney, and should receive equal credence.

Fiat.

(a) 3 Bing. N. C. 293 ; 3 Scott, 657.

COOPER v. FOLKES.

The following is a sufficient addition of a deponent to an affidavit. "Augustus Ackermann, of No. 21, Tokenhouse Yard, in the City of London, notary, clerk to Charles Knight, of the same place."

Where a party moves to discharge a rule obtained for a *distringas* to compel appearance, he should bring before the Court the affidavits upon which that rule was granted.

BOMPAS, Serjt., moved for a rule, calling upon the plaintiff to shew cause, why the rule for the issuing of a writ

of *distringas*, to compel appearance in this suit, should not be discharged. The ground of the motion was, that the defendant was abroad at the time of the alleged attempts to serve the copy of the writ of summons upon him, in an insane state of mind.

1840.

COOPER

v.

FOLKES.

Channell, Serjt., on a subsequent day, shewed cause. He took a preliminary objection to the reception of one of the affidavits on which the rule had been obtained, on the ground of the incorrect and insufficient addition of the deponent. The person who made the affidavit described himself as "Augustus Aekermann, of No. 21, Tokenhouse-yard, in the City of London, notary, clerk to Charles Knight, of the same place." The rule to be deduced from the various decisions which had taken place upon this subject was, that the deponent might, in a case of this description, give the particulars of the residence and employment of the person in whose service he was, instead of his own. Here, the deponent gave no particulars whatever of his employer's occupation or business; and the description which he gave of himself, without such a description of his employer, was insufficient. He stated himself to be "clerk to Charles Knight," which shewed that he was independent of that person, but that he was connected with him.

TINDAL, C. J.—The description is sufficiently intelligible. The object is that you may know where to find the deponent, in case of necessity, and here, there is quite enough to enable you to do so.

Channell then proceeded to argue upon the sufficiency of the affidavits, upon which it was sought to obtain the discharge of the rule for the *distringas*. Those affidavits disclosed certain statements made by the wife of the defendant and two female servants, who swore that the defendant was insane, and had gone abroad in Nov. 1837, for the benefit

1840.

COOPER

v.
FOLKES.

of his health. Mrs. Folkes swore that since that time, to her knowledge and belief, the defendant had not since been in England; and one servant swore that she had lived with her present mistress since November, 1838, at her residence, and that, to the best of her belief, the defendant had not been at her mistress's said residence since that time. The third deponent swore, that when attempts were made to serve the defendant with the copy of the writ of summons in this action, she informed the applicant, that the defendant was abroad. These statements were only brought down to the 12th April, 1840, however, and the rule for the *distringas* was obtained on the 6th June. It was quite consistent with the allegations made, that in the intervening period the defendant had been in England, and new and unsuccessful attempts had been made to serve him with process. The materials upon which it was sought to set aside the rule for the *distringas* were insufficient, not only in this particular, but in the defendant not having brought before the Court the affidavits of the plaintiff, on which that rule had been obtained. It was quite consistent with the statements made, that it might be positively sworn in those affidavits, that the defendant had been seen at his residence, but had kept out of the way to avoid service.

Bompas, Serjt., in support of the rule, urged that materials had been produced, in the affidavits sworn on behalf of the defendant, amply sufficient to entitle the defendant to call for the discharge of the rule for the *distringas*, and to shew that that rule had been obtained in fraud of the Court. [*Tindal*, C. J.—We are left very much in the dark, because you have not brought before the Court the affidavits upon which the rule for the *distringas* was granted. There is a strong presumption in favour of the act of the Court, and therefore you ought clearly to have brought them before it. The affidavit of the wife of the defendant may be contradicted by those affidavits, for she may have been mistaken as to the absence of her hus-

1840.

COOPER
v.
FOLKES.

band; and the other deponents may have seen him in London.] The rule, which was granted for the *distringas*, was referred to, and it was for the plaintiff to bring the facts upon which he relied, before the Court, in answer to this motion. The affidavits, in effect, shewed Mrs. Folkes to have been resident in London, and were in as positive terms as could be used, as to the belief of the deponents that the defendant had not been in England. The defendant was unable to make any affidavit himself, because he was insane. [Tindal, C. J.—Have you the affidavit of any one at Boulogne? It is a case of all others, in which it would have been easy to procure such an affidavit from the keeper, or the person in whose care the defendant has been.] No such affidavit had been obtained.

TINDAL, C. J.—The real question is, whether my brother *Bompas* is in a condition at present to make this application? And I am certain, that if the attention of the Court had been called to the affidavits minutely, at the time of the rule to shew cause being asked for, they would not have granted it, unless the affidavits, on which the rule for a *distringas* was obtained, had been brought before them. We must give credit to the Court for granting the *distringas* on proper grounds only; but leaving out of view all that occurred on that motion, it is now said, that enough is sworn, to call upon the Court to set aside the *distringas*. It may hereafter be found, however, (though I do not mean to say that such will be the case) that there were the affidavits of three or four persons in support of that motion, who may swear that they saw the defendant looking out of the window of his own house, about the time of the attempts being made to serve him with process. At present, therefore, I think we should not make this rule absolute.

The rest of the Court concurred.

Rule discharged.

1840.

SMITH v. DAVIS.

Where a plaintiff seeks to discharge a rule for judgment as in case of a nonsuit, offering a stet processus, upon the ground that the defendant is insolvent, it ought to appear clearly from his affidavit that he was not aware of the defendant's insolvency, before the commencement of the suit.

CHANNELL, Serjt., shewed cause, against a rule for judgment as in case of a nonsuit, obtained on behalf of the defendant in this action. An offer had been made of a stet processus, but the defendant had refused to accept it. An affidavit was now produced, which stated, that since the commencement of the action, the deponent had learned that the defendant was in indigent circumstances, and unable to pay the debt and costs, and alleged that that belief was confirmed by the receipt of a letter from the defendant's attorney, who expressed his apprehensions that he should lose his costs. *Smith v. Badcock* (a) shewed that the Court would compel a stet processus to be accepted, where the defendant was bankrupt.

Stephen, Serjt., in support of the rule. The defendant had obtained an advantage of which he ought not to be deprived. It was quite consistent with the affidavit, that the plaintiff was aware of his poverty before the action was commenced; *Lemon v. Hopson* (b). He was entitled, therefore, to a peremptory undertaking.

TINDAL, C. J.—I think that the affidavit is defective, and that the rule must be discharged upon a peremptory undertaking. It ought to appear, by the plaintiff's own shewing, that he did not know that the defendant was insolvent before the action was commenced.

Rule discharged on a peremptory undertaking.

(a) *Ante*, vol. 5, p. 91.

(b) *Ante*, vol. 6, p. 795.

1840.

MORGAN v. MILLER AND ANOTHER.

THE SOLICITOR GENERAL moved for a rule, calling upon the plaintiff to shew cause, why the taxation of costs in this suit, should not be reviewed by the Master. It was a cause which had been long pending before this Court, and in which issues had been tried, and certain questions had been discussed, both in this Court, and in the Court of Chancery. The cause had been originally referred to arbitration, by an order of nisi prius, of the 30th of February, 1836, and by the terms of that order, a decree in Chancery was also to be referred by consent. The plaintiffs, however, subsequently obtained a rule to set aside the order of nisi prius, and the defendants also obtained a rule for an attachment against the plaintiffs for not obeying that order, and the cross rules having come before the Court, for consideration, on the 25th of November, 1839, a rule was pronounced in the following terms: "It is ordered, that the plaintiffs be at liberty to proceed to the trial of this cause, on payment, by the said plaintiffs to the defendants of the costs of the day of the 30th of February, 1836, and on the payment of 150*l.* out of Court, and also on the payment, by the plaintiffs and Mrs. Farden, to the defendants or their attorney, of the costs of, and occasioned by the applications to the Court." The bills of costs had been carried before the Master for taxation, and he had refused to allow certain items, to which, under the terms of the rule, it was contended that the defendants were entitled.

Under the item of the costs of the day, was a charge for the costs of a special jury summoned to try the cause; there was also a charge made for an application to the judge at nisi prius, to fix a day for the trial; both of which had been disallowed. Under the second head of costs of and

The following rule was promulgated upon the discussion of a rule nisi in this Court: "It is ordered that the plaintiffs should be at liberty to proceed to the trial of this cause, on payment, by the said plaintiffs, to the defendants, of the costs of the day of the 20th of February, 1836, and on payment by the plaintiffs to the defendants of the costs of, and occasioned by the applications to this Court:" *Held* that in taxing the costs, the Master, under the head of costs of the day, correctly refused to allow the costs attending the summoning a special jury, and of an application to the Court by the defendant to postpone the trial, and that under the head of costs of, and occasioned by the applications to the Court, he properly disallowed costs of consultations antecedent to these

motions, and costs of a short-hand writer's notes of discussions in the Court of Chancery, upon a subject connected with the suit, and upon which the parties were required to report to the Court.

1840.

MORGAN
and Anotherv.
MILLER
and Another.

occasioned by the applications to the Court, there was a charge for consultation, and conferences antecedent to those applications, and a charge also of a short-hand writer's notes of certain motions made in the Chancery Courts, the particulars of which were required to be produced by this Court for their information, to both of which objections had been raised, and both of which had been disallowed.

Talfourd and *Kelly* on a subsequent day, shewed cause. They contended that the Master had acted strictly in accordance with his duty in following the terms of the rule promulgated by the Court, and in acting upon those general principles upon which the taxation of costs was always conducted. The costs of the rule for a special jury did not come within the meaning of "costs of the day," but that expression referred only to such costs as the party was entitled to claim in the ordinary course of the administration of justice. The costs of a special jury, however, would only be given upon the certificate of a judge. The application to the judge at nisi prius, to fix a day for the trial, was one made by the defendants entirely for their own convenience, and for which, therefore, it was unjust that the plaintiffs should be called upon to pay. The effect of it, was only to postpone the day of appointment for the commencement of the trial from Saturday to Monday. With regard to the second branch of costs claimed as being "costs of and occasioned by the applications to the Court," the Master had exercised an equally sound discretion. The costs of conferences and consultations previous to applications to the Court, were charges which were never recognized, and there was nothing in the rule, which called for any departure from the accustomed system of taxation. It was to be observed that the Court could not determine upon what had been the subject matters of those consultations, or how far therefore, the charges were reasonable; and furthermore, that the motions were rather occasioned by the conferences, than that the costs of those conferences were occasioned by

the applications to the Court. With regard to the charge for the short-hand writer's notes, it was of a nature quite unusual. The notes were of some discussions which had been had in Chancery, and the propriety of the decision of the Master was exhibited by the fact, that that portion of the notes which was material had been embodied in the affidavits, and had, in that manner, been allowed. Those too, like the costs of the conferences, could, in no degree, be considered as occasioned by the applications, as they had been incurred antecedently to those applications being made. It was the defendants, besides, who had had the benefits arising from those notes, if any had been produced by them, and it would be extremely hard to call upon the plaintiffs to pay for them. The present question was not one which required the maintenance of any principle, but it depended merely upon the terms of the rule which had been pronounced, and upon the proper construction to be put upon its provisions. That rule had already been much discussed, as well at the time of its promulgation, as since, and the Court would not now come to any decision, which would affect its proper meaning according to the ordinary acceptance of its terms.

1840.
 MORGAN
 and Another
 v.
 MILLER
 and Another.

The Solicitor General, in support of the rule. The effect of the rule which was pronounced, and upon which this discussion arose, was to bring the plaintiffs into contempt, and it was by their obedience to its terms that they were to purge themselves of that contempt. The costs of the special jury were costs which had not been needlessly incurred, and which ought to have been allowed to the defendants. It was admitted that in ordinary cases, such costs would not be claimed, unless under the certificate of a judge; but here, the costs to be paid were more in the nature of costs between attorney and client, than between party and party; and the words of the rule were wide enough to admit of such a conclusion being drawn. With respect to the costs of the application to postpone the day

1840.
MORGAN
and Another
v.
MILLER
and Another.

of trial, they were incurred entirely in consequence of the plaintiffs' own act. It was sworn that the plaintiffs were in the possession of certain papers, which had been ordered to be deposited with the clerk in Court, in order that they might be used in the case by the defendants. They had neglected to do so, however, and the defendants had, in consequence, been compelled to instruct counsel to apply to the Court, although that application was rendered unnecessary, by reason of the plaintiffs' consent being given to the postponement, and to the production of the requisite documents. Both these items, therefore, fell strictly within the description of those costs which were described as costs of the day. Upon the second head; the costs of the consultations were of a nature to which the defendants ought to be deemed entitled. It was to be observed, that the order of nisi prius was to be carried into effect by the machinery of the Court of Chancery. They were expenses which the defendants were compelled to incur when they came to this Court, to complain of the infraction of the rules of the other Court, and were essential to give effect to the applications which were made. Equity barristers were present at those consultations, and had been heard in Court upon arguing the rules, which were the result of them. Those consultations must be deemed to have been "occasioned by" the applications, because they were occasioned by the applications, just as much as the preparing the instructions, upon which counsel were to move. The costs of the shorthand writer were, in like manner, occasioned by the applications. The defendants had been referred to the Court of Chancery by their lordships, and it was necessary that they should be able to present a correct report of what occurred there, upon their coming back to this Court, and in order to avoid their being contradicted by counter affidavits of the mere recollection of parties as to what occurred, it had been deemed best to procure the assistance of a shorthand writer. The notes, which were taken and transcribed, became the subject of examination by the Court,

with a view to their coming to their conclusion upon the subject, and upon their inspection of them they declared the plaintiffs to be in contempt. A very small portion of them was embodied in the affidavits, and the Court would not consider sufficient the argument urged upon this part of the case.

1840.
 MORGAN
 and Another
 v.
 MILLER
 and Another.

TINDAL, C. J.—Although this application is, in point of form, an application that the Master shall review his taxation of costs, the Court cannot but consider it in substance to be an application to alter the form of the rule entered into between the parties. The rule was drawn up after great consideration, and a draft of it was signed by counsel on both sides, and the only question is, whether the rule being taken to speak for itself, the Master has fallen short of the duty imposed upon him, on the taxation of costs? I am not able to say, after all I have heard, that this rule being interpreted in its terms, it is to be considered that the Master has been guilty of any default. Possibly, if the rule had been insisted upon by the defendant, not to be taken in its ordinary form, and if it had been framed in a different manner, its effect might have been different, but I think that it would be dangerous to say, that when it was drawn up in the ordinary terms, the Court ought now to interfere.

BOSANQUET, J.—This is an application that the Master shall be required to review his taxation of costs, and the question is, whether, looking at the rule as it is drawn up, the Master has misapplied it? The rule is framed according to ordinary well-known expressions. The costs of the day are directed to be paid, and the costs of, and occasioned by the motion in this Court; and it appears to me, beside the proper object of this motion, to enter into the merits of the case which led the Court to decide that rule. Farther than that, however, it is to be considered, as it appears from a memorandum of the Master, the form of the

1840.

MORGAN
and Another

v.
MILLER
and Another.

rule was on the 30th of May last, made the subject of discussion at the bar, and after a great deal of consideration, the Court refused to grant the application, and the rule was drawn up in the form in which it now stands. I am not prepared to say that in applying the terms of this rule as he has, the Master has done wrong. The terms of this motion are, that the taxation should be reviewed, but the real substance is to alter the form of the rule. It is beside the question to do that, and I think that this rule must be discharged.

COLTMAN, J.—I agree with the opinion expressed by the Court. If the defendant had intended to have anything out of the ordinary course, he should have taken care to frame his rule so as to meet the case. This rule, it seems to be admitted, if it was to be construed in the ordinary way, has been rightly construed, and that being the case, it would be introducing a principle of great laxity, if in consequence of some words which fell from the Court upon giving judgment upon a former occasion, we should now hold that the Master, who had nothing before him but the rule, had done wrong in following the terms of that rule.

MAULE, J.—I am of the same opinion. It appears that an application was made on the 30th of May, that the terms of the rule should be varied, and that a direction should be given, how the rule was to be drawn up as to costs. A discussion took place then, but the rule was eventually drawn up in the terms in which it now stands. The parties are, in my opinion, to be bound by those terms. It is not denied that the rule, according to ordinary circumstances has been properly construed, and there is nothing in my opinion, which shews that the Court should put any other construction on it.

Rule discharged, without costs.

1840.

KENNY v. BISHOP.

THE Solicitor General shewed cause, against a rule, which had been obtained by *Storks*, Serjt., for setting aside the copy of the writ of summons, on the ground of irregularity, with costs. He urged that the motion was in the wrong form. It should have been to set aside the service, and not the copy. *Crow v. Field*. (a) [*Tindal*, C. J.—In *Hall v. Redington*, (b) it was held, that where the copy of a writ served on the defendant was irregular, the application should be to set aside the service, or in the alternative the copy or service; and that an application to set aside the copy served was nugatory. The same principle was acted upon in *Truslove v. Whitechurch*. (c)] Another sufficient answer to the motion was, that the copy was quite regular, and strictly followed the terms of the writ, although that, it was admitted, was informal, but that objection had been waived.

A motion to set aside the copy of a writ of summons, on the ground of irregularity, is informal.

Storks, Serjt., endeavoured to distinguish this case from those cited.

TINDAL, C. J.—I think the decisions which have been referred to, form a sufficient answer to this motion, and shew that this is an informal and insufficient mode of taking advantage of such an irregularity as is alleged. I scarcely know what setting aside the copy is. Setting aside the service is more intelligible.

Rule discharged, with costs.

(a) *Ante*, vol. 8, p. 231.

(b) 5 M. & W. 605.

(c) *Ante*, vol. 8, p. 837; S. C.

1 Scott. New Rep. 417.

1840.

Where the deed to lead the uses is sufficient to cover all the lands intended to be passed, an application to amend the recovery, by inserting the name of a parish under the 3 & 4 Wm. 4, c. 74, s. 8. Fines and Recoveries Act, is unnecessary.

Re WATKINS.

STORKS, Serjt., moved for leave to amend a recovery in the Court of Great Session, by adding to it the name of the parish of G. It set out the conveyance of lands in the parish of L., but an affidavit was produced, in which it was stated, that certain lands in the parish of G. were also intended to be passed.

TINDAL, C. J.—I think the eighth section of the Fines and Recoveries Act, (3 & 4 Wm. 4, c. 74) renders the application unnecessary. That act provides, “that if it be apparent from the deed making the tenant to the writ of entry, or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, &c. in such recovery, or any mis-description or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings, in which such error, mis-description, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, mis-description, or omission.” In *Totton v. Vincent*, (a) the deed would not cover the defect, but here it does. It includes “all the lands in the county of Montgomery,” and these sweeping words, coupled with the act of Parliament, render the application unnecessary.

Rule refused.

(a) 5 N. C. 626.

1840.

MARRIOTT v. STANLEY.

THIS was an action on the case, in which the plaintiff sought to recover a compensation in damages, for a serious personal injury sustained by him, as it was alleged, in consequence of the defendant having wrongfully exposed to sale certain ploughshares, and other articles of the like nature, on a public highway, in the town of Peterborough, in Northamptonshire. The cause had been tried before *Little-dale*, J., at the last Summer Assizes, where it appeared that the defendant, who was an ironmonger, had placed the articles in question upon the causeway opposite his shop, on a market day, and that the plaintiff, while driving his pony-cart past the defendant's house, was thrown out of the vehicle against the ploughshares, and severely injured in his knee. The bill for medical attendance, in consequence of the injury, it was proved, amounted to upwards of 20*l*., but notwithstanding the opinion of the learned judge, the jury returned a verdict for 1*s*. damages. An application was then made to the learned judge, to certify, under the second section of Lord Denman's Act, (3 & 4 Vict. c. 24); but although he was desirous of doing so, he expressed his opinion that he was prevented by the terms of the act, an opinion which was strengthened by that of the Lord Chief Justice, who sat in the adjoining Court, and whom he consulted upon the subject.

The statute, 3 & 4 Vict. c. 24, s. 2, applies to *all* actions of trespass, and trespass on the case; and the Court will not exclude from its operation a case, where only 1*s*. damages has been given, for an injury arising from defendant's negligence, apparently contrary to the justice of the case, the judge trying the cause having refused to certify.

Goulburn, Serjt., now moved for a rule, calling upon the defendant to shew cause, why the Master should not be directed to tax the plaintiff his costs, notwithstanding the absence of the certificate under the act. The effect of the new act was not to repeal the Statute of Gloucester, under which, the plaintiff was entitled to ask for costs. The provision of the Act of Victoria was, that if the plaintiff,

1840.
MARRIOTT
v.
STANLEY.

in *any* action of trespass, or trespass on the case, should recover less damages than 40s., he should not be entitled to recover in respect of such verdict any costs whatever, except in certain cases specified. The effect of the word *any*, was to give the judge an extended power to consider the statute applicable or not, and the case not being brought to try a right within the meaning of the new act, the Court might deem the case to be within the principle of the Statute of Gloucester.

TINDAL, C. J.—We are to take it for granted, that the verdict found by the jury in this case, gave a just measure of damages to the plaintiff. Then we find the case to be one in which there is a verdict for 1s., and we have no right to assume that the party is entitled to more. The act is express in its terms, and provides, “that if the plaintiff in any action of trespass, or of trespass on the case, brought, or to be brought, in any of Her Majesty’s Courts at Westminster, &c., shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer, before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages, for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious.” As at present advised, I think we have no power to grant this application, or to say otherwise than that the operation of the act deprives the plaintiff of his costs. The facts of the case did not give the learned judge the power to grant the certificate, and he did not do so.

BOSANQUET, J.—It is said that in this case the plaintiff is entitled to costs, under the Statute of Gloucester, although he has only recovered 1*s.* damages. The statute of Elizabeth is repealed, which enabled the judge to deprive the party of costs, and then the new act provides that costs shall not be given, unless the judge certifies. The judge here has not certified under the new act. I am by no means prepared to say, that in an action of trespass on the case, the plaintiff may not set up a right, but the question is what this case is? The question of negligence does not set up a right, and that is the only point on which it can be said that this case comes within the operation of the statute.

COLTMAN, J., concurred.

MAULE, J.—I think also that this application cannot succeed. The words of the statute are clear, and apply not as the statute of Charles did, as to what is the issue upon the trial, but to the ground on which the action was brought. It is impossible that this action can have been brought for the purpose of trying a right, and no certificate, therefore, could have been granted. But the intention of the legislature is expressed in this statute, section 1, “Whereas an act passed in the 43rd year of the year of Queen Elizabeth, intituled, ‘An act to avoid trifling and frivolous suits in law in Her Majesty’s Courts in Westminster,’ and another act, passed in the 22nd and 23rd years of the reign of King Charles the Second, intituled, ‘An Act for laying impositions on proceedings at law,’ which recites, that many good subjects of this realm, have been and daily are undone by such suits, contrary to the intention of the said statute of Queen Elizabeth; but the same evil, notwithstanding, doth still prevail and increase, and it is expedient to make further provision for the prevention thereof; Now be it enacted, &c.” A suit in which less than forty shillings is properly recovered is frivolous within the intention of the act, but those are ex-

1840.

MARRIOTT

v.

STANLEY.

1840.

MARRIOTT

v.

STANLEY.

ceptions to it, which are in fact brought to try, not merely the right to recover damages, but to try a right beyond that, or to vindicate the plaintiff from the vexation of a wilful and malicious injury. All others are frivolous and vexatious, and the plaintiff should be deprived of his costs. In this case, the only thing that suggests a doubt, is that which we have no business to take into consideration; namely, that the plaintiff did suffer very severe injury in consequence of the negligence of the defendant. But it was entirely for the judge to decide, whether, upon that, and the evidence upon the trial, it appeared to him, that the action was brought to try a right, or whether it was an injury wilfully and maliciously inflicted. He did enter into the consideration of that point, and refused to certify. We cannot remedy that which is said to be his error. The real ground of complaint is, that the jury found less damages than the plaintiff was entitled to; but the defendant may not have done wrong, and the jury, in estimating the damages, may have taken into their consideration, not merely what the plaintiff should recover, but what the defendant should pay. If we were to agree to this motion, the effect would be, that every plaintiff in an action for negligence, no matter what the amount of damages recovered, or the opinion of the judge, would obtain his costs, the very mischief intended to be prevented.

Rule refused.

TEMPLE v. KEILY.

Pleas, alleging the consideration of a debt to be money lent for the purposes of gaming; and money lost at play may be pleaded to the same declaration, without the imposition of a condition that different matters of defence, shall be given in evidence under them.

CHANNELL, Serjt., moved for a rule, calling upon the plaintiff to shew cause, why so much of an order made at Chambers, by *Rolfe*, B., and of a rule making that order a rule of Court, giving the defendant liberty to plead several pleas, as conferred, that leave conditionally should not be

pleaded, without the imposition of a condition that different matters of defence, shall be given in evidence under them.

1840.

TEMPLE

v.

KEILY.

rescinded, and why the defendant should not plead those pleas unconditionally. It was an action of assumpsit, brought upon an agreement, by which the defendant was alleged to have undertaken to produce the bodies of two persons, in order that a writ of *ca. sa.* might be executed upon them, or in default thereof to pay a sum of 550*l.* The object of the defendant's pleas was to impeach the validity of a judgment recovered for the debt due from the persons named in the declaration, and he sought to do so upon two grounds; first, that the consideration of the debt was money lent to those persons in the shape of counters for the purpose of gaming; and secondly, that it was money lost at play. Upon an application being made to *Rolfe, B.*, at Chambers, he made an order, allowing pleas setting up these defences to be pleaded, conditionally upon the defendant giving distinct matters of defence in evidence under them. It was submitted, that the pleas were not in apparent violation of the rule of Court, H. T. 4 W. 4, s. 1, and that they set up distinct and substantive matters of defence, and that, therefore, they ought to be pleaded without the condition imposed. The same facts might, indeed, form the groundwork of the two defences, but the effect of those facts, under the Statute against Gaming, might be widely different.

The Solicitor General, on a subsequent day, shewed cause. He produced an affidavit, which stated that the imposition of the condition had been consented to by the defendant, when before the Judge. The two pleas, however, evidently referred to the same subject matter differently stated.

Channell, Serjt., contra. There had evidently been some misapprehension as to the consent of the defendant to the condition. The imposition of that condition had been distinctly objected to, and it was not likely that the defendant,

1840.

TEMPLE
v.
KEILY.

after such a consent being given, would now come to the Court. The effect of the two pleas sought to be pleaded was widely different. They had already been allowed to be pleaded, which was a sufficient assurance that they were not in apparent violation of the rule of Court, and the Court would not now permit such a condition to be imposed as was sought to be adopted, to restrict the defendant in his answers.

Cur. adv. vult.

BOSANQUET, J., on the following morning, said, we think this rule must be made absolute, for striking out the condition imposed by my brother Rolfe, but we do not determine what is or what is not an apparent violation of the rule upon the subject of two different subject matters of defence. It appears to us that the two defences are manifestly different, and if they are manifestly different, the condition which is inserted in this order ought not to be imposed. One of the pleas alleges the loan of money for the purpose of its being employed in gaming, and the other alleges the debt to have been contracted in respect of money lost at play. These pleas are founded upon different parts of the same statute. It is possible that both may have originated in one transaction, but if the defences are different in their nature, we think that they are distinct defences within the meaning of the rule of H. T. 4 W. 4. Another answer to this application has been set up, which is grounded on the allegation that the order was drawn up with the consent of the parties. We have looked into the affidavits, and we find that the order appears to have been drawn up in opposition to an objection which was made to the insertion of this condition, and that there is no reason why, on this account, this rule should not be made absolute.

Rule absolute.

1840.

NEWTON and Wife v. HARLAND and Another.

NEWTON moved for a rule, calling upon the defendants to shew cause, why the postea should not be drawn from the original indorsement of the verdict of the jury, made in Court, and why all the words of another indorsement, which had been placed upon the record, should not be struck out.

[*Tindal*, C. J.—The usual course in cases where there has been any error, or supposed error, in entering the postea, is to apply to the Judge who tried the cause, to give directions from his notes as to the proper mode of drawing it.]

That course had been already taken, an application having been made to *Coltman*, J., at Chambers, who, however, declined to make any order. The plaintiffs, therefore, considered themselves entitled to come to the Court. The ground of the motion was, that the verdict having been entered by the Associate in a particular manner, it had been subsequently found to have been altered, by the severance of the finding of the jury upon one of the issues. [*Coltman*, J.—The amended entry was made by my direction before I left the Court on the day of the trial.] But it had been made in the absence of the plaintiffs, and without their knowledge, and they had, therefore, a right to come to the Court, the Judge having refused to make any order upon the subject at Chambers. [*Bosanquet*, J.—If this application is in the nature of an original application, the Court is not the proper forum to come to. If it is in the nature of an appeal from the decision of the Judge we cannot entertain the motion.] The fact of the alteration having been made without the knowledge of the plaintiffs was sufficient to entitle them to apply to the Court. An application was made by the defendant's counsel to have the verdict entered in a particular way, which, however, was refused, but subsequently it was found that that, or a similar motion, had been acceded to. [*Coltman*, J.—After I had first given my opinion upon the subject, I thought that the

Where a party complains of an erroneous entry of the verdict by the Associate, the proper course is to apply to the judge who tried the cause, to correct the entry by his notes. Where such an application has been made and the judge has refused to make any order, the Court will not entertain a motion to review his decision.

1840.

NEWTON
and Wife

v.
HARLAND
and Another.

application was well founded, and I, therefore, directed the verdict to be entered as it now appears.]

TINDAL, C. J.—It appears to me that the answer to this application is, that the party has come to the wrong forum, or tribunal. The proper course is to apply to the Judge who tried the cause to enter up the *postea*, if there is any doubt concerning it, according to the evidence upon his notes. Here, that course has been pursued; the party has been before the learned Judge, and that Judge is satisfied that the order which is applied for should not be granted. If any one has been guilty of altering the record, the application would be of a different character, and there would be a proceeding against the officer.

BOSANQUET, J.—If the entry were made improperly by the officer, the proper course would be to go before the Judge, who would hear both parties, and come to a decision. Now here, the entry has been made according to the direction of the learned Judge, and the party thinking that it is incorrect, has taken out a summons, upon which the Judge has refused to make any order.

MAULE, J.—I am of the same opinion. The Judge gave directions as to how the verdict was to be entered, and in a little while after he altered those directions. The proper mode of taking advantage of any supposed error is to go before the Judge himself. That has been done here, and the Judge has disposed of the matter.

COLTMAN, J., concurred.

Rule refused.



1840.

Doe dem. CHANNELL v. ROE.

HALCOMB, Serjt., moved for judgment against the casual ejector. The declaration was entitled in the present Michaelmas Term, but the notice was to appear in "the next Michaelmas Term." The declaration was served on the 27th of October, and then the tenant said that he knew that no steps could be taken until March next.

TINDAL, C. J.—That shews that he meant to take advantage of the objection. The rule cannot be granted.

Rule refused.

the commencement of the Term, and the tenant then said that he knew that no step could be taken until the following March: the Court refused to grant the rule.

On an application for judgment against the casual ejector, it appeared that the declaration was wrongly entitled of Michaelmas Term, 1840, with notice to appear in the "next Michaelmas Term." The declaration was served before

CHESSEY v. RIDGWAY.

CHANNELL, Serjt., moved for a rule, calling upon the attorney of the plaintiff to shew cause, why the trial of this cause should not be postponed. The affidavit on which the motion was grounded, stated that the plaintiff, who was the captain of a ship, went abroad in 1839, and that accounts, which were believed to be true, had since been received of his death abroad. The plaintiff's attorney would undoubtedly proceed to trial at his peril, but if the verdict went against the defendant, he could only take advantage of the circumstance by assigning error in fact, and in any event he would be liable to a new action by the plaintiff's executors, in case of the report which had been received being confirmed. The peculiarity of the case was the impossibility

Intelligence having been received of the death of the plaintiff abroad, the Court, upon the application of the defendant, granted a rule for postponing the trial, until the Court, or a judge should direct it to be had, the plaintiff's attorney admitting that some doubts existed as to

whether his client was still alive or not.

1840.
 CHESSEY
 v.
 RIDGWAY.

of making any absolute deposition as to the death of the plaintiff. The Court granted a rule nisi, and on a subsequent day in term,

Channell, Serjt., moved to make the rule absolute, on an affidavit of service. A communication had been received from the plaintiff's attorney, who admitted that considerable doubts existed whether the plaintiff was alive or not, and declined to oppose the rule. There was no objection, however, in case of the plaintiff being found to be still living, to allow him to preserve his rights, and it was, therefore, prayed, that the rule might be made absolute for postponing the trial, until the Court or a Judge should direct it to be had.

The COURT granted the rule absolute in these terms.

Rule absolute.

CHUCK v. HARRIS.

The general rule is, that the party who obtains an order for a special jury must use the utmost diligence to get the jury ready, by the time for which notice of trial has been given, and therefore if the defendant obtains a rule for a special jury, the non-attendance of the plaintiff at appointments requisite in procuring a special jury, the defendant is not necessarily excused for not having the jury ready in due time.

CHANNELL, Serjt., shewed cause against a rule nisi, obtained on behalf of the plaintiff, for discharging the defendant's rule for a special jury in this suit. He produced affidavits, tending to shew that the action was one, the nature of which rendered the summoning of a special jury proper and necessary.

Bompas, Serjt., in support of the rule. The rule for a special jury had been obtained at Chambers by the defendant, on the 4th of November, with an appointment to nominate on the 5th. The plaintiff, however, did not attend that appointment, and a new appointment was taken

ready in due time.

out for the following day, the 6th. The defendant then became entitled to a list of the special jury, and gave notice to the plaintiff of an appointment to reduce the jury on the 9th of November. This appointment was not attended by the plaintiff, and a new appointment was taken out for the 10th. Notice of trial had been previously given by the plaintiff, for Wednesday, the 11th of November, the first Sittings in Term. Two clear days were requisite, after the special jury had been reduced, to admit of their being summoned, but it was a rule, which had been acted upon in the case of *Gunn v. Honeyman*, (a) that when a defendant applied for a special jury, it was his duty to take such measures to secure his object, as should enable the plaintiff to bring the cause to trial on the day for which notice had been given. In this case it was impossible to do so.

1840.
 CHUCK
 v.
 HARRIS.

Channell, Serjt., contra. It was in consequence of the plaintiff's inattention to the appointments, that the proceedings had been so long delayed, as to prevent the cause being tried in its proper course at the first Sitting in Term. The proceedings to the 6th of November were perfectly regular, and then the defendant had gone so far as to obtain a list of the special jury. He had, therefore, exercised his right to the special jury; and, under ordinary circumstances, the cause could not then be tried at the Sittings in Term. [*Tindal*, C. J.—You are not to assume that, because that is the general rule, you are to delay your subsequent proceedings in reducing the jury.] It was clear, at all events, that it was the plaintiff's neglect which drove the defendant so near the time, for which notice of trial had been given.

TINDAL, C. J.—The justice of the case will be answered

(a) 2 B. & Ald. 400.

1840.

CHUCK

v.

HARRIS.

by the cause being tried at the last Sittings in Term by a special jury. The general principle, certainly, is, that the person who obtains an order for a special jury must use the utmost diligence to get the jury ready by the time for which notice of trial is given.

The rule was subsequently discharged upon terms agreed upon between the parties.

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GWYNNE v. COLLINS.

Money having been paid into the hands of the Prothonotary of this Court, "in lieu of bail, to satisfy the costs in error," the Court refused to retain any portion of the amount so paid in, to satisfy a demand made by the adverse party, for costs incurred in the cause antecedently to the writ of error being obtained.

STORKS, Serjt., shewed cause against a rule, obtained on behalf of the plaintiff (in error), in this cause, for the repayment to him of the two sums of 1132*l.* 15*s.* 2*d.* and of 257*l.* 11*s.* 10*d.*, deposited with the Prothonotary of this Court, in lieu of bail. It was an action which had been long pending in this Court, and in which a demurrer to two of the pleas of the present plaintiff (defendant in this Court), had been argued in 1831 (*a*). Judgment upon that argument was given for the plaintiff, who thereupon became entitled to certain costs. The cause was subsequently tried, and a special verdict was returned for the plaintiff below; that verdict having been argued in this Court, judgment was given for the plaintiff in the original action; but that decision was made the subject of a writ of error, which was argued in the Court of Exchequer Chamber, where the judgment of this Court was affirmed, and in the House of Lords, where the decisions of the two inferior Courts were overturned, and judgment was given for the plaintiff in error. Upon the writ of error being obtained, the plaintiff in error was called upon to pay into the hands of the Prothonotary the two sums, which were the subject of the

(*a*) 7 Bing. 423.

present motion, "in lieu of bail to satisfy the costs in error." This motion was now made upon the decision of the House of Lords in favour of the present plaintiff. It was submitted that the Court would not accede to the application in its terms. The costs of the demurrer, which had been decided in favour of the present defendant (plaintiff below), and upon the judgment on which no doubt had ever been expressed, not yet been paid. The Court, therefore, would detain so much of the amount as would meet those costs. [*Tindal*, C. J.—How can we put our hands on this fund, which by a specific contract was destined for an entirely different purpose?] It was to be remembered that the money was paid in by the plaintiff in error himself, and that there could be no hardship in compelling him to pay costs, to which there could be no doubt he was liable.

1840.

Gwynne

v.

Collins.

Bompas, Serjt., in support of the rule. The money was paid into Court in the case in error only. If bail had been put in instead, they could not have been made answerable for bygone costs, in respect of which they entered into no agreement, and the Court would not deal so unfairly with the plaintiff as to detain any of the money, to the re-payment of which he was fairly entitled.

TINDAL, C. J.—The terms of the rule under which the money was paid into the hands of the Prothonotary were, "in lieu of bail, to satisfy the costs in error." That cannot be supposed to apply to the costs of the demurrer, which had been disposed of long before.

Rule absolute.



1840.

Ex parte MARY WILLIAMS.

In support of an application for a married woman to be permitted to convey her interest in an estate, without the concurrence of her husband, an affidavit was produced, sworn by the sister of the married woman, who stated that the person, on whose behalf the application was made, was speechless: the Court refused to grant the application without an affidavit, that the married woman herself had been examined.

MEREWETHER, Serjt., moved, that Mary Williams, a married woman, might be permitted to convey her interest in a certain estate, without the concurrence of her husband, under the provisions of the Fines and Recoveries Act, (3 & 4 Wm. 4, c. 74). The affidavit stated the facts necessary to entitle the applicant to the assent of the Court to the motion, but it appeared that Mary Williams herself had not been examined. An affidavit was produced, sworn by her sister, from which it appeared, that the person on whose behalf the application was made, was speechless. This, it was urged, would prevent her making any statement.

TINDAL, C. J.—She must have declared herself willing to execute the conveyance; how can she have done that? Besides, how are we to know that this application is made with her consent?

BOSANQUET, J.—It is necessary to negative communication between the wife and the husband in this case. Who can do that but the wife herself?

Motion refused (*a*).

(*a*) Upon a subsequent day in Term, the application was renewed, an affidavit of the applicant having been obtained, and the motion was then granted.

GREENWOOD v. SELDEN and Another.

An affidavit, in support of a motion for a distringas, stated that the defendant could not be found: that the defendant was partner with another person, joined with him in the action; that the defendant's residence was unknown, but that communications had been had with his partner, at their counting-house, in the course of which the latter stated, that the defendant "was in England:" the affidavit, however, contained no statement of an inquiry having been made as to where the defendant was, and the Court refused to grant the application.

BOMPAS, Serjt., moved for a distringas, against one of the defendants to this suit. It was an action brought

against the defendants, who were partners, in respect of a partnership transaction, and one of the defendants had been duly served with the writ of summons. The residence of the other defendant was unknown, and communications having been made with his partner, he said that "he was in England." The necessary calls and appointments were then made at the counting-house of the two defendants, and process was served there in the usual way. It was submitted, that this was a sufficient case, to shew that the defendant was keeping out of the way to avoid service. It was proposed to execute the distringas at the defendants' counting-house. [*Maule, J.*—There is no allegation of the deponent having asked where the defendant was.] That deficiency could be supplied by an allegation to that effect, and of the question having been met by a refusal on the part of the partner to supply the required information.

1840.
GREENWOOD
v.
SELDEN
and Another.

TINDAL, C. J.—You had better add that allegation.

BOSANQUET, J.—Your materials are not perfect, and you must come again with an amended affidavit. We should be granting the rule, if we acceded to your application, before you are entitled to it. We must form our judgment on what you swear.

Rule refused.

The motion was subsequently renewed upon an affidavit, amended in the particulars suggested, and was granted.

RICHARDSON v. PETO.

SHEE, Serjt., moved for a rule, calling upon the defendant to shew cause, why the rule absolute for judgment as in having been obtained, a motion was made, calling upon the defendant to shew cause, why that rule should not be discharged, upon the ground of its having been moved, contrary to an alleged understanding between the plaintiff's attorney, and the defendant's counsel, at a conversation which took place upon their accidentally meeting in the street: The Court refused, upon that ground, to discharge the rule, and to set aside judgment as in case of a nonsuit signed pursuant to it.

A rule absolute for judgment as in case of a nonsuit

1840.
RICHARDSON
v.
PETO.

case of a nonsuit, obtained in this action, should not be discharged, and why the judgment obtained thereon should not be set aside. The ground upon which the motion was made, was, that the judgment was signed against good faith, and contrary to the understanding between the parties. The affidavit, in support of the motion, stated, that on the 2nd November, a motion was made in this Court for a rule nisi for judgment as in case of a nonsuit, which, having been granted, was made returnable on the 5th of the same month. Subsequently the attorney of the plaintiff accidentally met the counsel for the defendant in Holborn, and, according to his statement, represented to him that the plaintiff was ill, and unable to give the necessary instructions to enable him to shew cause against the rule, and, therefore, requested that he would postpone moving the rule absolute; the learned counsel consented to this proposition, upon his being further informed that it was the intention of the deponent to instruct counsel to oppose the rule, and said that there was no hurry, but advised the deponent to be as quick as he could. Notwithstanding the understanding of the deponent, however, founded upon this conversation, that the rule would not be brought on before the end of the Term, the rule absolute was moved by the same learned counsel on the 12th November.

The Solicitor General, on a subsequent day, shewed cause, and contended, that there was no ground for the motion. It was contrary to the interests, and to the practice of the profession, that the attorney of either plaintiff or defendant in an action, should endeavour by such means as had been adopted here, to obtain from the adverse counsel any promise with regard to the future progress of the cause. He objected to the introduction of conversations with learned counsel, into affidavits, as being calculated to destroy that independence of position, in which barristers stood before the Court; barristers, of course, in such cases, could not be required to make affidavits, because the effect of their doing

so, might be to entirely alter their views, as well as their immediate situation, in relation to the matter which was pending. Upon other grounds, however, the motion must fail; the judgment was not actually signed until the 18th November, and the plaintiff stated no ground, upon which he could call upon the Court to declare that there was any reason for setting aside the judgment.

1840.
 RICHARDSON
 v.
 Peto.

The learned counsel referred to, who was also instructed to shew cause, said, that although, of course, as he had made no affidavit in answer to this motion, it would ill become him to offer any statement to the Court, yet he could not help, in his own justification, stating, that a very considerable portion of what was sworn to have fallen from the attorney, in the conversation which they had had together, had not reached his ears. All that he had heard was, that the attorney had been to the Chambers of the learned counsel, whom he intended to employ, to shew cause against the rule nisi, and had not been able to find him. He thereupon undoubtedly desired that he would lose no time in preparing the necessary instructions to shew cause.

Shee, Serjt., in support of the rule, had intended to offer no suggestion unfavourable to the courtesy of the learned gentleman: but he certainly thought that where so much misconception appeared to have arisen in the mind of the plaintiff's attorney, as to what was to be done, the Court would let him in to shew cause against the rule for judgment as in case of a nonsuit. That was his real object, and he was quite willing to offer terms advantageous to the defendant.

TINDAL, C. J.—I think that this rule must be discharged. It seems to me, that the grounds on which the plaintiff appears before the Court on this motion, places counsel in a false position in the case, and, if they were recognised, would be exceedingly detrimental to the practice of the Bar.

1840.
 RICHARDSON
 v.
 Peto.

The attorney represents his client throughout the cause, from its commencement to its termination ; but the counsel only represents his client in Court, and it would be confusing the positions of these two important branches of the profession, if we held that notice given to a learned gentleman out of Court, should be binding upon the party whom he represents. For the purpose, therefore, of avoiding a bad example, I think this rule should be discharged, but generally only, and without anything being said as to costs.

Rule discharged.

SHUTTLEWORTH v. COCKER.

In an action for a nuisance, the plaintiff alleged that he was possessed of a certain messuage, and that the defendant being possessed of a certain mill and workshop, so wrongfully used certain engines, funnels, chimneys, and manufactories, as that a noise, smoke, and deleterious dust came therefrom, and injured the plaintiff's house, and made it unin-

habitable ; the defendant pleaded not guilty : *Held*, that the action was brought to try a right beyond the mere right to recover damages, and was within the principle of the second section of the 3 & 4 Vict. c. 24, and that *l.s.* damages only having been given by the jury, the judge was empowered to certify, to give the plaintiff his costs.

Semble, that such a certificate should be granted immediately, on the termination of the trial.

A judge having so granted a certificate, and ordered an entry to be made on the back of the record, and an insufficient entry having been made and signed by him, he may nevertheless subsequently alter and amend the entry, the erroneous indorsement being considered a misprision or mistake of the clerk of the Court.

jured the plaintiff's said messuage, and rendered it uninhabitable. The defendant pleaded not guilty, and the cause came on to be tried before *Tindal*, C. J., at Derby, at the summer assizes of the present year. From the evidence, it then appeared that the defendant carried on the business of a needle manufacturer, and that his premises adjoined those of the plaintiff. The steel dust produced in the manufacture of needles, by drilling the eyes and filing the points, having been found to be peculiarly hurtful to the workmen engaged in the business, to whom serious diseases, causing premature death, were produced, by their inhaling the small particles of steel floating in the air, the defendant devised a plan of removing this inconvenience, by carrying off the filings, by means of a strong current of air, through a funnel, into the open air. The effect of this, however, was to carry the filings into the grounds of the plaintiff, who thereupon commenced his action for this nuisance, as well as for the nuisance alleged to have been created by the smoke and sooty particles proceeding from the chimnies of the defendant's manufactory. At the trial it was shewn that the defendant had exerted himself, as well before as since the commencement of the suit, to abate the nuisance caused by the discharge of the steel filings into the open air, and had at length succeeded in attaining his object, by carrying them into a running brook, in which they were deposited. The manufactory was still carried on, however, and the nuisance, which was alleged to be caused by the chimnies, still continued. At the trial, the witnesses were cross-examined by the defendant, with a view to shew that the former nuisance had been abated, but the plaintiff gave up his claim to damages, and the Lord Chief Justice having put the case to the Jury, as being one where damages were not the object, but the maintenance of a right, on the part of the plaintiff, to have his house free from the nuisance complained of, a verdict for 1s. only was returned. An application was then made to the learned Judge to grant a certificate, under the stat. 3 & 4 Vict. c. 24 (Lord Denman's

1840.

SHUTTLE-
WORTH.v.
COCKER.

1840.
SHUTTLE-
WORTH
v.
COCKER.

Act), granting the plaintiff his costs, and the motion was acceded to. The object of the present motion was to procure the certificate thus granted to be rescinded; first, on the ground of the insufficiency of the indorsement on the record; and next, on the ground of its having been erroneously granted in this case by the learned Judge, the action not being an action really brought to try a right. The form of the indorsement was as follows:—"I certify that the right came in question upon the trial of this cause. —N. C. Tindal."

The Solicitor General, upon a subsequent day, shewed cause. Since the motion for the rule nisi had been made, the learned Lord Chief Justice, upon application made to him by the plaintiff, had made a fresh indorsement on the record, by which the certificate now stood in the following form: "I certify that this action was really brought to try a right, besides the mere right to recover damages for the trespass and grievances alleged in the declaration, and for which this action was brought, and that the right came in question upon the trial of this cause. N. C. Tindal." It was now urged, first, that the certificate first granted was in a form sufficiently in compliance with the act of Parliament. The terms of the 2nd section of the 3 & 4 Vict. c. 24, were these, "Be it enacted, that if the plaintiff in any action of trespass, or trespass on the case, brought, or to be brought in any of Her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover, by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought

1840.

SHUTTLE-
WORTH
v.
COCKER.

to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." It was to be observed that there was no form of certificate prescribed by the act, and there could be no doubt whatever upon the pleadings, as well as upon the facts of the case, that the real question in the cause was the right of the defendant to carry on his manufactory, and the right of the plaintiff to maintain his premises free from the nuisance wrongfully produced by the defendant's proceeding. The certificate described *the* right to have come in question, which could have referred but to one right, and the question upon that right must be taken to have pervaded the cause throughout its progress. It was not a matter upon which the strictness and nicety of special pleading would be observed; but if the certificate, in substance, conveyed the meaning which was intended, that would be sufficient to meet the requisites of the statute. The application was, besides, against good faith, because the plaintiff gave up his right to damages upon the trial, upon the understanding that his right was all that he need maintain; a fact which at once excluded all idea of its being a mere action for damages. No doubt could exist as to what was the intention of the learned judge in granting the certificate, but it was trusted that a judicial opinion being publicly and openly pronounced at Nisi Prius, upon which a minute was directed to be made, the Court would have no doubt of the power of the judge subsequently to amend or fill up that minute in a formal manner. Upon this second branch of the argument, it was to be observed, that the act imposed no tie upon the judge as to the time of making the certificate except in the words "immediately after," which were used. Cases had arisen where similar expressions had been held to be capable of a more extended meaning than they appeared to convey, and that a reasonable time might be taken to be comprehended by such a provision.

1840.
 SHUTTLE-
 WORTH
 v.
 COCKER.

Whalley v. Williamson(a), *Foxall v. Banks*(b), *Ford v. Parr*(c), *Woolley v. Whitby*(d). It was the common and daily practice of the Courts, however, to allow the records to be amended by the notes of the learned judges, in important particulars; and in a case of this description the Court would have no hesitation in holding, that what must be deemed to be an erroneous entry might be amended, in conformity with the original expressed meaning of the learned judge.

Adams, Serjt., *contra*. The question of right was not raised by the pleadings, nor by the circumstances of the case. The declaration alleged no right on the part of the plaintiff, and the only effect of the plea of not guilty, under the pleading rules, was to put in issue the fact of the defendant having carried on his business in such a way as to be a nuisance to the plaintiff in his occupation of his house. [*Tindal*, C. J.—Is not its effect rather to state that the defendant had a right to carry on the trade as he did?] If that was so, the right must be said to come in question in every action of trespass which might be brought. The distinction was, that no man could set up a right to commit what might be a nuisance, unless he could justify under a claim of right. The existence of such a right could only be arrived at upon the evidence. [*Coltman*, J.—Is this Court a tribunal to try whether the learned Lord Chief Justice has properly exercised the discretion reposed in him?] It was impossible, on the pleadings, that this action could have been brought to try any right, but the right to damages; and although the plaintiff alleged that the carrying on the business by the defendant was wrongful, he did so only in the popular sense. It was not a case, therefore, in which the learned judge was authorised to grant a certificate at all; the whole of the evidence at the trial, and the

(a) *Ante*, vol. 7, p. 253.

(b) 5 B. & Ald. 536.

(c) 2 Wils. 21.

(d) 2 B. & C. 580; 7 Scott, 135.

1840.

SHUTTLE-
WORTH
&
COCKER.

whole course of the proceedings, shewed that there was no claim of right at all, except that which arose upon the allegation of the defendant doing wrong; but the real issue was one merely of whether the defendant had carried on his trade so as to be a nuisance to his neighbours. But the first certificate, even if it was rightly granted upon a review of the case, was insufficient. It certified a fact which was wholly immaterial under the statute, that the right came in question at the trial. The question was, whether the action was really brought to try a right? The second certificate was a nullity. It was a new certificate, and was of no avail, unless it was given "immediately after" the trial. *Waggett v. Shaw* (a), in reference to the statute, 24 Geo. 2, c. 18, shewed that the words of the act must be construed literally. The Court would not recognise it as an amended certificate, because there was nothing by which it could be amended; and even if there was, the judge, being functus officio, so far as the cause was concerned, at the time of its being re-drawn, had no authority to make any new indorsement on the record.

TINDAL, C. J.—Upon the first point made, whether the case, under the circumstances which attended it, is one which falls within the scope of the act of Parliament? I feel no doubt whatever that the action, as it is alleged on the record, and from the course which the evidence took at the trial at the assizes, is one on which a judge would have authority to make a certificate. The second section of the 3 & 4 Vict. c. 24, provides, "That if the plaintiff in any action of trespass, or of trespass on the case, brought, or to be brought, in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever,

(a) 3 Camp. 315.

1840.
SHUTTLE-
WORTH
v.
COCKER.

whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." Now, I take the object of this act to be to prevent plaintiffs from bringing actions of a vexatious and litigious nature, where only a small damage has been sustained, and where no right whatever is in issue between the parties; and if actions are brought in such instances, certificates cannot be granted, and the plaintiffs lose their costs. Was this an action subject to this provision? It is a case in which the plaintiff says, that he was possessed of a messuage in the county of Derby, and that the defendant, being possessed of a certain mill and workshop in the said county, and that the defendant so used certain engines, funnels, chimnies, and manufactories, as that a noise, smoke, and deleterious dust came from them, and injured the plaintiff's house, and made it uninhabitable. The defendant, in answer to this allegation, says, that he is not guilty; that is, he denies that which is stated on the face of the declaration has in fact taken place. Looking at these circumstances, the plaintiff declares that his house is rendered uninhabitable by reason of the defendant's acts; and, on the other side, the defendant insisting on going on with the works which he has commenced, and which the plaintiff says form the ground and gravamen of his charge, who can say that a question of right does not arise between the parties? The plaintiff complains that his right to his house, free of the nuisance which is alleged on the record, is invaded; and the defendant says, on the other side, that this which is alleged to be a nuisance is, in fact, none at all. Therefore, looking at the facts of the case, it does not

appear to be one in which the plaintiff is going on vexatiously, or for small damages only, but that it is a case in which the right came in question. On the evidence which was adduced the case took the same course. The defendant strove, not so much to prove that the plaintiff had sustained very small damages only, and the cross-examination was very much directed to that point, as that the defendant had adopted modes of carrying on his manufactory with as little injury as possible, still maintaining his right, however, to carry on the same business. Therefore, in my opinion, it is an action really brought to try a right, besides the mere right to recover damages, and one cannot but ask why, if it were not so, the defendant did not admit the right of action, and proceed only on that part of the case which would be directed to the mitigation of damages? It is observable that the certificate may comprehend two different statements; one is, that the action is not merely brought to try the right to recover damages; the object of that is to prevent plaintiffs from bringing petty actions for small grievances. Such a case may be instanced in an action brought against a defendant for walking across the close of the plaintiff, where no question of right whatever would arise, but the action would be brought merely to vex and harass the defendant with costs, which would be added to the damages. That is a case in which the act is intended to operate favourably for a defendant; but you may suppose a case of a man not doing any damage, and yet not claiming any right, but merely committing such a trespass as I have suggested in order to distress and annoy the plaintiff; and in that case the judge would have a right to certify that the case was one where the trespass was wilful and malicious. Then this being a case within the act, the question is, whether what I will call the amended certificate, which has been put on the record, is by law authorised to be made, and is available. I will not stop to inquire whether the first certificate is, in point of form, sufficient, for that is unnecessary to the point on which I rest my judg-

1840.
SHUTTLE-
WORTH
v.
COCKER.

1840.
SHUTTLE-
WORTH
v
COCKER.

ment; neither will I lay down any rule as to whether a certificate must be given immediately after the trial or not, though undoubtedly the words of the act are very strong upon the subject, but if ever it should be necessary to do so, I should pause long before I said that it is not necessary to grant the certificate, if at all, immediately. What I ground my judgment on is this, that the certificate was granted immediately after the verdict, and that that which was then done, and of which advantage is now sought to be taken, was no more than a mistake or misprision of the officer who handed up the record erroneously indorsed, as it now appears. Let us see how these cases occur in Court: the judge says, that he will grant a certificate, no one doubting at all what that certificate is. A new cause is called on, and is commenced, and just as the judge is intent upon it, and is endeavouring to obtain a knowledge of its facts from the opening speech of counsel, the postea is handed up, and he puts his name to it, supposing it to be indorsed in the manner which he has ordered; and in doing so he gives no more than the usual credence which is given to all officers of the Court. Supposing that on looking at the indorsement the judge should find that the word "not" was put into it erroneously, so as to make it appear that he would not certify, can it be said that on the next day, or the next minute, for the argument in both cases is equally strong, he must not amend it? Or supposing an indorsement to be made, foreign to the purpose, as in a case of nuisance, that a battery came in issue, it would be almost trifling to say, that the judge, having signed the certificate on the faith of its being a proper one, finding it to be thus useless, and opposed to his intention, may not amend it. I meant in this case to grant a certificate under the statute 3 & 4 Vict. c. 24, and the officer handed me up a certificate, available under no circumstances, and framed under no act of Parliament at all, and that guides my mind to the conclusion that this certificate may be amended. It is no more to do so in this than in many other cases. What is

the rule in the case of the Associate taking a verdict on the record at the time of the trial on certain counts erroneously? It is every day's practice for him to say that he was wrong, and to request the judge to set it right by his notes. What is the case under the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), where by misprision or neglect the officer has not supplied the fact of a proclamation being made? That question has come before the Court (*a*), and we have held, that if in any such instance there has been a mistake by the officer, the Court will set it right, in order that the suitor may not be injured by the neglect of the officer. I think, therefore, that the amendment is quite justifiable in practice, and, besides, meets the merits of this case, and that the rule must consequently be discharged.

1840.
 SHUTTLE-
 WORTH
 v.
 COCKER.

BOSANQUET, J.—I am also of opinion that the Lord Chief Justice was authorised to certify under the statute 3 & 4 Vict. c. 24. It has been contended, that this is not a case in which the action can be said to be brought for the purpose of trying the right, independent of the right to damages. It is an action brought for a nuisance, and the plea is Not Guilty, by which the defendant says, that he has not committed the wrong of which the plaintiff says he is entitled to complain; or, in other words, that if the fact has been done, as stated, he had a right to do it. In order to support the defendant's view, the action must not have been brought to try the right, and the defendant must have admitted that he had no right to do the act; and if the real question was as to the damages only, there is no doubt that it would be a case in which the judge should not have certified; but if it was the right which was in dispute, the Court cannot enter into the question whether the judge has or has not exercised a sound discretion on the evidence, although the evidence in this case, which has been stated, shews me, that the action was brought, not to try a question

(*a*) *Evans v. Davies*, ante, vol. 7, p. 259.

1840.
SHUTTLE-
WORTH
v.
COCKER.

of damages only, but a question of right? The defendant, it appears, insisted that he was not in the wrong, that he was right, and in consequence that the plaintiff had no right to maintain the action. That was sufficient ground for the judge to infer that the action was brought for the purpose of trying the right, and not merely for the purpose of recovering damages, and that is the result of the learned Chief Justice's opinion on the case. Then, supposing that this was a case in which my Lord Chief Justice was justified in holding that the action was brought to try the right, independently of the question of damages, then comes the question, whether it was so held, and whether the act should be done immediately after the case was tried? Now, with respect to this question, my strong inclination is, that it should be done according to the words of the act, "immediately after" the case was tried. That is, that it should not be left until a long period of time after, or for any period of time after the assizes, except when the matter should be desired to be made the subject of further consideration by the learned judge, and being mentioned consent should be given, the judge intimating his consent to take time. Now in this case, it appears that the application was made at the proper time to the judge to certify. That application was made under the statute of Victoria; it could be made under no other act, and the judge referring to the evidence given before him at the time, assented to the application, and directed the certificate to be drawn up accordingly. The officer draws up a certificate, which had manifest reference to the cause and matter in dispute, but it was not couched in the proper terms contained in the act. It was drawn, however, as a certificate by the direction of the learned judge, for the purpose of certifying under this act, and under no other act; and, consequently, the direction given was a direction to certify within the terms of the act. What is the error which was committed but the misprision of the officer? The certificate was handed up to the judge, who put his hand to it, giving credit to the

officer for having drawn it correctly, and after that it turns out that it is inaccurate ; but it was made at the time under the statute. Under these circumstances, then, the judge who directed it to be made was warranted in amending it conformably to an application to him, and also to his original direction, and, therefore, conformably to the words of the statute under which he ordered it to be drawn.

1840.
SHUTTLE-
WORTH
v.
COCKER.

COLTMAN, J.—I am quite of the same opinion. This is an application to set aside a certificate granted under the 3 & 4 Vict. c. 24, on the ground that the case is one, in which it should not have been granted under the statute. I agree that if on the record it appeared to be such a case, the certificate should be set aside, but it appears to me that it is not a case of that nature. The certificate, under the provisions of the statute, may be given where the action is really brought to try a right. That may not appear in the pleadings of the defendant, and I do not apprehend that it was the intention of the legislature to deprive a plaintiff of his costs, if he originally brought an action, with the object of trying a right, but the defendant refused to contest that question with him. Then we are called upon to look at the evidence itself, and to say, whether, on it the judge was authorized to give the certificate? I think, however, that we are not authorized to do that, although, if we were, I do not imagine that any difficulty could arise, because it seems to me that the action does appear, from the evidence, to have been brought to try a right. As to the next question, of the time of granting the certificate, I quite agree that it would be dangerous to depart from the words of the statute, and, probably, if it were necessary to decide that question, the sounder decision would be, that it would be better to grant it immediately, that is, before the adjournment of the Court. As to the certificate itself, I think that where a judge has directed an officer to make an entry, and that entry is erroneously drawn by the officer, and not in conformity with the order of the judge, the judge may sub-

1840.
SHUTTLE-
WORTH
v.
COCKER.

sequently correct it on his own knowledge, in order that it may be entered nunc pro tunc.

MAULE, J.—I think also that the rule in this case must be discharged. The question, with respect to the cases, in which a judge has jurisdiction to grant a certificate does not arise here. In this instance, the certificate to be granted was, that the action was brought to try a right, besides the mere right to recover damages, and it is said, that on the pleadings on this record, such a question did not arise at the trial at all; but I think that it did, and that the right did come in question, although even in that event, the real point for consideration, whether the action was brought to try a right, is not determined. With regard to this subject, it may be observed, that the right, very likely, may not be asserted on the record, because the defendant may not have thought fit to deny that the right necessary to the support of the plaintiff's case existed. The same circumstance may arise in many instances; thus, trover may be brought to try very important rights, though it does not appear on the record; an action for money had and received may, in the same way, involve a question of right, although nothing but the mere cause of action appears on the record. It is quite beside the intention of the act, that any opinion shall be expressed, whether any question of right came in issue at the trial, because the real object which the legislature had in passing it, was to prevent vexatious actions for damages. I think, therefore, that there is no doubt that this is a case in which the learned judge had a right to grant his certificate. Then if that be so, all that has been said, with respect to what passed at the trial, has nothing to do with the question now before the Court, because it is clear, that the power of judging as to the right is vested in the judge at nisi prius, without being subject to any review of the Court from which the record issued. But if we are to enter into that question, there is no doubt that this was an action brought to try the right. Then, the certificate

which was granted at the trial does not contain at full length all the words required by the act. The certificate was unquestionably granted "immediately after" the trial, and it was a certificate intended to be granted under the provisions of this act, because it could not be granted under any other statute. The object of the defendant has been to shew that the statute has not been satisfied, in respect of the first certificate; or that in respect of the amended certificate, the decision of the learned judge was not pronounced at the time, and under the circumstances required. The object of the original certificate is sufficiently intimated upon the face of it, and the probability is, that it would be sufficient, without any amendment; but it being suggested that it is not so sufficient, I think that the learned judge has only exercised that power in amending it which he was authorized. The certificate is not drawn up by the plaintiff himself, but it is an act of the Court, and the erroneous indorsement being a misprision of the officer, it is a mistake which the judge, being cognizant of his own intention, is entitled to remedy by an amendment. This amendment, therefore, was properly made, and the certificate for the purposes of this motion was "immediately" granted, and is good.

1840.
SHUTTLE-
WORTH
v.
COCKER.

Rule discharged.

COURT OF QUEEN'S BENCH.

Michaelmas Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1840.

REGINA v. The JUSTICES OF RADNORSHIRE.

In an order by magistrates, under 11 Geo. 2, c. 19, s. 4, it is necessary that the offence should be charged to have been committed "wilfully and knowingly."

V. WILLIAMS and Gray shewed cause against a rule nisi, obtained by *Butt*, for issuing a certiorari to remove an order, or conviction of a person named Cranmer, before certain justices of Radnorshire, for assisting a person named Morgan, in fraudulently and clandestinely removing his goods, contrary to the provisions of 11 Geo. 2, c. 19, in order to prevent their being distrained for rent. The order had been confirmed, on appeal, by the Court of Quarter Sessions. The proceedings were taken under section 4 of the statute, as the amount of the goods removed did not exceed 50*l*. The information, on which the conviction was founded, was in the following form:—

"Radnorshire to wit. Be it remembered, that this 29th day of February, in the year of our Lord, 1840, Richard Morgan, of Nantmel, in the county of Radnor, carpenter, complaineth that John Cranmer has fraudulently and clandestinely removed and carried away certain goods and chattels of the said John Cranmer, not exceeding the value of 50*l*, from certain premises at Bryn, in the parish of Nantmel, in the said county, which premises were demised to the said John Cranmer, at the yearly rent of 38*l*, payable half yearly, *viz.* on the 29th of September, and the 25th of March, to prevent the said Richard Morgan from distraining the said goods and chattels for arrears of rent, amounting to 99*l*, due to the said Richard Morgan from

the said John Cranmer, for the said premises, on the 29th day of September last; and that William Morgan, of Abercarnle, in the parish of Llandewy Ystradlenny, in the said county, farmer, wilfully and knowingly aided and assisted the said John Cranmer, by fraudulently and clandestinely receiving and concealing the said goods and chattels, contrary to the form of the statute in that case made and provided.

1840.
 REGINA
 v.
 The Justices of
 RADNOR-
 SHIRE.

“ Exhibited at the 29th day of February, 1840, before Thomas Prickard, Esq., a justice of the peace for the county of Radnor, residing near the place from whence the said goods and chattels were removed, and not being interested in the said premises whence such goods and chattels were removed.

“ THOMAS PRICKARD,
 “ RICHARD MORGAN.”

On this information, a conviction proceeded, which was as follows :—

“ Radnorshire to wit. Be it remembered that on the 29th day of February, A. D. 1840, at Deria, in the county of Radnor, Richard Morgan, of Parke, in the parish of Nantmel, in the same county, carpenter, in his own person, came before me, Thomas Prickard, Esq., one of her Majesty's justices of the peace in and for the said county, residing near the place from whence the goods and chattels hereinafter mentioned were removed, and not being interested in the lands or premises whence such goods and chattels were removed, as hereinafter mentioned, and informed me, in writing, that John Cranmer, of Bryn, in the parish of Nantmel, in the county of Radnor, farmer, held and enjoyed a certain farm, lands, and premises, with the appurtenances, called Bryn, situate in the parish of Nantmel, in the county of Radnor, as tenant thereof, to the said Richard Morgan, under a demise thereof, theretofore made at the yearly rent of 38*l.*, payable half yearly, to wit, on the 29th day of September, and the 25th day of March, by even and equal portions, and that on the 29th day of Sep-

1840.
REGINA
v.
The Justices of
RADNOR-
SHIRE.

tember, A. D. 1839, the sum of 99*l.* was, and on the 12th day of February still was due, in arrear, and unpaid from the said John Cranmer to the said Richard Morgan; and that the said sum of 99*l.*, the rent aforesaid, being due, in arrear, and unpaid from the said John Cranmer to the said Richard Morgan, the said John Cranmer afterwards, that is to say, on the 12th day of February, A. D. 1840, fraudulently and clandestinely conveyed away and carried off and from the said demised premises, three cows, two yearlings, and one filly, being the goods and chattels of the said John Cranmer, and the same not exceeding the value of 50*l.*, but being of less value, to wit, of the value of 35*l.* 15*s.*, of lawful money of Great Britain, to prevent the said Richard Morgan from distraining the same for the said arrears of rent, and that William Morgan, of Abercamle, in the parish of Llandewy, Ystradlenny, in the said county of Radnor, on the same day and year last aforesaid, at the parish of Nantmel aforesaid, in the county aforesaid, did wilfully and knowingly aid and assist the said John Cranmer in such fraudulent and clandestine conveying and carrying away and concealing the said goods and chattels, and every part thereof, contrary to the form of the statute in that case made and provided. Whereupon the said William Morgan, after being duly summoned to answer the said charge contained in the said information, appeared on the 13th day of March, in the year aforesaid, at Rhayaden, in the said county, before us, T. Lewis Lloyd and Thomas Prickard, Esqs., two of her Majesty's justices of the peace in and for the said county, and residing near the place from whence the said goods and chattels were removed, and not being either of us interested in the said premises whence the said goods and chattels were removed, and we, the said justices, having duly examined the facts, and all proper witnesses, upon oath, and it appearing and being fully proved, upon oath, before us, that the said William Morgan did, on the said 12th day of February, in the year aforesaid, aid and assist the said John Cranmer in frau-

dulently and clandestinely removing and carrying away the said goods and chattels, and concealing the same as aforesaid, being of the value of 35*l.* 15*s.*, to prevent the said Richard Morgan from distraining the said goods and chattels for the said arrears of rent, contrary to the statute in that case made and provided. We, the said justices, do, therefore, determine and adjudge that the said William Morgan is guilty of the offence with which he is charged as aforesaid, and he is accordingly by us convicted thereof, and we do hereby order and adjudge him to pay the sum of 71*l.* 10*s.*, being double the value of the said goods and chattels, to the said complainant, on or before the day of in the year aforesaid.

“ Given under our hands and seals, at Rhayaden, the day of March, 1840.”

1840.
REGINA
v.
The Justices of
RADNOR-
SHIRE.

A variety of objections had been taken to the order, but the principal one was, that it did not sufficiently appear, on the face of the order, that the defendant, against whom the complaint was brought, had knowingly and wilfully assisted in the removal of the goods. On that point it was to be observed, that whatever might be the construction put on the instrument in question, if it was a conviction, the same particularity was not necessary in this case, because it was a mere order and not a conviction. In point of law, a great distinction existed between an order and a conviction. A conviction might be drawn up at any time, after the justices had pronounced their decision; but orders must be drawn up before they were acted upon. Good reason, therefore, existed for the rule of construction which prevailed, that the Courts were disposed to be more strict in construing convictions than in construing orders. In the case of *Rex v. The Justices of Cheshire* (a), it was held, that an adjudication of justices under 11 Geo. 2, c. 19, s. 4, inflicting penalties for fraudulently removing goods to avoid a distress, is an order, and not a conviction, and cannot, therefore,

(a) 5 B. & Adol. 439.

1840.
 REGINA
 v.
 The Justices of
 RADNOR-
 SHIRE.

like a conviction, be returned to the sessions in an amended form. So in *Rex v. Bissex* (a), it was held only to be an order. With respect to the strictness required in an order, in contradistinction to an indictment, or a conviction, the case of *Rex v. Middlehurst* (b) was a direct authority. There, it was held that an order of sessions on the statute in question, which charged the offence in the alternative, was good. Lord *Mansfield* said, “upon indictments it has been so determined, that an alternative charge is not good;” as “forged, *or* caused to be forged;” though one only need be proved if laid conjunctively (as “forged, *and* caused to be forged.”) But I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect. But this is an order; and, being good in substance, needs not be so literally strict. So, in *Rex v. Venables* (c) it was held, that if a justice is empowered to make an order for suppressing ale-houses, and on disobedience to make an order for the commitment of the offender, the latter order is not to bare execution of the first. The justice is punishable if he make the latter order without summoning the offender; but it is not necessary that he should set forth in the order that he did so. There, the Court held, that “they would intend the justices having jurisdiction had proceeded regularly, and that there was a summons.” Here, also, it would be intended that the justices had proceeded regularly, and according to law, and it must, therefore, be intended that as the justices had ordered the payment in question to be made by the defendant, they had received proof that he wilfully and knowingly assisted the tenant in the removal of the goods. In *Rex v. Rabbits* (d), it was held, that an order and adjudication founded on 11 Geo. 2, c. 19, s. 4, for fraudulently and clandestinely

(a) 1 Burn's Justice, by Chitty,
1129, Ed. 28.

(b) 1 Burr. 399.

(c) 2 Lord Raym. 1405.

(d) 6 D. & R. 341.

removing goods and chattels, not exceeding the value of 50*l.*, to avoid a distress for rent, need not enumerate or specify the particular goods and chattels alleged to have been removed. By the express principle of law; as well as on the cases cited, it was clear that it would have been enough for the justices to have found that the defendant was guilty, and convicted him accordingly. The order might have stated the information, and then have proceeded to allege that the justices had examined all proper witnesses, and then have found the defendant guilty. It was objected that they ought to proceed to state how they found the defendant guilty. That was not, however, necessary to be stated by them more than by a jury. In the form given in *Burn's Justice*, title "*Distress*," the evidence is directed to be set out, and that might be necessary, if the order in this case was a conviction. But being an order, if the party had been merely found guilty by the magistrates, that would have been sufficient.

1840.
 REGINA
 v.
 The Justices of
 RADNOR-
 SHIRE.

Butt, in support of the rule, submitted, that as the order did not contain any allegation that the defendant did wilfully and knowingly aid and assist, the order charged no offence to have been committed. In the form to be found in *Burn's Justice*, those words were introduced, and that form had been approved in the case of *Rex v. Rabbetts*. If the order was bad, the statement of the complaint would not cure substantial defects in it; the case of *Rex v. Davis* (a) was an authority to that effect. In the case of *Brooke v. Noakes* (b), which was an action on the third section of the statute in question, it was held to be incumbent on the landlord, not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant. There, Mr. Justice Bayley said, "the statute 11 Geo. 2, c. 19, s. 3, is remedial as well as penal. It is remedial, so far as it enlarges

(a) 5 B. & Ad. 554; 2 Nev. & Man. 349.

(b) 8 B. & C. 537; 2 Man. & Ry. 570.

1840.
 REGINA
 v.
 The Justices of
 RADNOR-
 SHIRE.

the remedy which the landlord had against his tenant; but it is so far penal, that a landlord who seeks to visit a third party with the penal consequences of the act, must bring the case, by strict proof, within the words of the enacting clause. It ought to have been proved, therefore, not only that the defendant assisted in the removal or concealment of the goods, but that he gave assistance with the intent to prevent the landlord from distraining." The same reasoning which applied to an action on the third section, must apply to a proceeding before magistrates under the fourth section. The words "wilfully and knowingly" were found also in the order in the cases of *Rex v. Middlehurst*, and *Rex v. Rabbitts*. No case precisely in point could be found; but on principle, and by analogy, it must be clear that those words ought to be introduced; unless they were, no offence within the statute was averred on the face of the order.

Cur. adv. vult.

WILLIAMS, J.—The following proceedings, founded on the 11 Geo. 2, c. 19, were removed into this Court (here his Lordship read the information and conviction). The provisions of the statute applicable to this case are, first, sect. 1, which empowers landlords, in case any tenant "shall fraudulently or clandestinely convey away or carry off or from" the premises demised, "his goods or chattels, to prevent the landlord from distraining the same for arrears of rent, within the space of thirty days next ensuing such conveying away, or carrying off, such goods or chattels, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent." By sect. 3, it is provided, that in order "to deter tenants from fraudulently conveying away their goods and chattels, and others from wilfully aiding or assisting therein, or concealing the same," "that if any person or persons shall wilfully and knowingly aid and assist any such tenant or lessee in such fraudulent conveying away, or carrying off, any part of

his or her goods or chattels, or in concealing the same, all and every person and persons so offending, shall forfeit to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid." By sect. 4 it is enacted, "that where the goods and chattels so fraudulently carried off or concealed, shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estates such goods and chattels were removed, his, her, or their bailiff, servant, or agent, in his, her, or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding, or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called quakers, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged: and to inquire in like manner of the value of the goods and chattels by him, her, or them respectively so fraudulently carried off or concealed as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices of peace may, and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her, or their bailiff, servant, or agent, at such time as the said justices shall appoint; and in case the offender or offenders, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders; and for want of such distress, may commit the offender or offenders to the house of correction, there to be kept to

1840.

REGINA

v.

The Justices of
RADNOR-
SHIRE.

1840.
 REGINA
 v.
 The Justices of
 RADNOR-
 SHIRE.

hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid, shall be sooner satisfied." During the argument, several objections were raised, into which I do not think it necessary to enter. The answer to them all depended mainly upon a distinction taken between an order and a conviction, and the leaning which the Court shewed, in order to sustain the former, in contradistinction to the latter. In the case of *Rex v. Davis*, it is called an order, and was so decided to be in the case of *Rex v. Bissett*. The judgment in that case, to a certain extent, depended on that point. It is, however, to be observed, that the terms "offender" and "offence" are used in the act, and sufficient penal consequences may follow the decision of the justices. It also appears that in an earlier case of *Rex v. Morgan (a)*, it is styled a conviction. So also in *Burn's Justice*, there is a very careful and accurate form given, in which the decision of the magistrates is treated as a conviction. Upon this distinction, however, too much reliance ought not to be placed. Admitting the general rule, which is confirmed by many cases, that a conviction should be construed strictly, and an order liberally, the value of that rule is greatly diminished by the difficulty of applying it to each particular case. I much doubt whether, upon examination, there will be found any rule of law which prescribes, or even allows, language to be forced from its ordinary import and fair meaning, to support one instrument or to invalidate the other. Since the case of *Rex v. Hulcott (b)*, which has been recognized in many subsequent and recent decisions, it may be questioned whether any intelligible distinction exists at all. The principal objection, however, was as to the sufficiency of the complaint. It is quite clear that the justices, who are to make the order upon the party to pay the money, are entrusted with the powers of the act, and the party is not to be convicted, and the order is not to be made, ex-

(a) Caldecott, 156.

(b) 6 T. R. 583.

cept "upon full proof of the offence." It has been already noticed, that the form in *Burn* pursues the formalities of a conviction in setting out the evidence. The case of *Rex v. Bissax*, before cited, decides that that is not necessary. But without interfering with that case, or questioning its authority, another consideration arises. The order does not state that the justices, having summoned the offender and heard evidence upon oath, adjudged the complaint to be true, if that would have been sufficient, which it is not necessary to decide; but a different course has been pursued. It does specify what was the full proof of the offence; but it does not thereby appear, by direct averment, that it was proved before the justices, that the party convicted, "wilfully and knowingly" assisted in the removal of the goods; nor is there any statement of evidence given before the justices, from which it can by any intendment be inferred that he did so assist. Without such evidence, no offence could have been committed. It seems to me, therefore, that the order is defective, and must, consequently, be quashed.

1840.
 REGINA
 v.
 The Justices of
 RADNOR-
 SHIRE.

Rule absolute.

ARCHER v. SMITH.

FRY moved for judgment as in case of a nonsuit, and that the rule should be drawn up with a stay of proceedings.

PATTESON, J.—A rule of this sort is never drawn up with a stay of proceedings. You may have your rule without that term being engrafted.

A rule for judgment as in case of a nonsuit, cannot be drawn up with a stay of proceedings.

Rule nisi accordingly.

1840.

Doe d. CHAFFEY v. ROE.

Service on the daughter of the tenant in possession with an acknowledgment by the wife before the term that the declaration, has come to the hands of her husband is sufficient for a rule nisi for judgment against the casual ejector.

S. HUGHES moved for judgment against the casual ejector. The affidavit on which he applied, stated a service on the daughter, before the term, on the premises; and an acknowledgment afterwards by the wife of the tenant, also before the term, that the declaration had been put into her husband's hands. It was submitted, on the authority of an *Anonymous* case, in 2 *Chit. Rep.* 182, that this was a sufficient service. There, a rule was granted, to shew cause why the service of a declaration in ejectment on a son of the tenant in possession, who said that his father was unable to attend to any business, and a subsequent admission by a person, whom the deponent believed to be the wife of the tenant in possession, that her husband had received it, should not be deemed good service. The cases *Doe d. Cockburn v. Roe* (a), and *Doe d. Wetherall v. Roe* (b), were authorities to the same effect.

PATTESON, J.—I think, on the authority of the cases collected in vol. 1 of *Chitty's Archbold*, p. 739, 7th ed., I may grant you a rule nisi.

Rule nisi granted.

(a) *Ante*, vol. 1, p. 692.

(b) *Ante*, vol. 2, p. 441.

WAINWRIGHT v. GIBSON.

Where a plaintiff has not proceeded to trial pursuant to his notice, if he sets up the insolvency of the defendant as excuse for the default, he ought to shew, by his affidavit, in terms, that the insolvency of the defendant was really his reason for not proceeding to trial.

W. H. WATSON shewed cause, against a rule obtained by *G. T. White*, for judgment as in case of a nonsuit, the plaintiff not having proceeded to trial pursuant to notice. In the affidavit, in answer to the rule for not proceeding

excuse for the default, he ought to shew, by his affidavit, in terms, that the insolvency of the defendant was really his reason for not proceeding to trial.

to trial, it was stated that the defendant had become insolvent. This, therefore, was a proper case for a *stet* process.

1840.
WAINWRIGHT
v.
GIBSON.

G. T. White, in support of the rule, contended, that this statement was not sufficient, as it did not appear, from the affidavit, that the information had been received as to the defendant's insolvency, since issue was joined. It had been lately held in the Court of Exchequer, in the case of *Mann v. Williamson* (a), that in order to constitute the insolvency of the defendant, a good excuse for not proceeding to trial, pursuant to notice, it ought to appear that a knowledge of the insolvency had reached the plaintiff after issue joined. It was quite consistent with the statement contained in the affidavit, in answer to the rule, that the information had been received immediately after the issuing of the writ, and, notwithstanding, the plaintiff had continued his action and given notice of trial. Besides, in this affidavit it was not stated that the plaintiff's reason for not proceeding to trial was the insolvency of the defendant. The mere fact of the insolvency was stated, and no connexion with that fact, and the plaintiff not proceeding to trial was mentioned.

PATTESON, J.—At any rate, the plaintiff ought to state that the insolvency was the reason for his not proceeding to trial. The plaintiff must give a peremptory undertaking.

Rule discharged accordingly.

(a) *Ante*, vol. 8, p. 859.

NICHOLAS and Others v. MERIT.

PRIDEAUX moved for leave to sign judgment on a warrant of attorney, above twenty years old. More than absolute, in the first instance, for judgment on a warrant of attorney more than ten years old cannot be granted, although the defendant, shortly before the application, has acknowledged the debt to be due.

Since the rule
1 Reg. Gen.,
H. T., 2 Wm.
4, s. 73, a rule

1840.
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 NICHOLAS
 and Others
 v.
 MERIT.

ten years having elapsed since it was executed, according to the rule of Court, 1 Reg. Gen. H. T., 2 Wm. 4, s. 73, (a), the plaintiff was only entitled to a rule nisi in the first instance. In the present case, however, it was submitted that the rule might be absolute at once. The defendant had lately given a direct and unequivocal acknowledgment, that the whole sum secured by the warrant was still due. He cited *Blakely v. Vincent*, from *Harrison's Digest*, tit. "*Warrant of Attorney and Cognovit*." No report was cited there, but 1 *Tidd's Practice*, 600, was mentioned as the authority. In that case, although the warrant was above twenty years old, the party having admitted the debt within two months preceding the motion, the Court granted the rule absolute in the first instance.

PATTESON, J.—There is no such passage in the modern editions of Mr. *Tidd's Practice*. I suppose the reason is, that as it was discovered that there was no foundation for it, the case was struck out. The rule of Court, however, is express on the point. The words of it are, "leave to enter up judgment on a warrant of attorney above one, and under ten years old, must be obtained by motion in Term, or by order of a judge in vacation; and if ten years old or more, upon a rule to shew cause." You are only entitled to a rule nisi.

Rule nisi granted.

(a) *Ante*, vol. 1, p. 192.

COPE v. LEA.

On moving to sign judgment on a warrant of attorney, it is not a sufficient excuse for not

producing an affidavit of the attesting witness, that an application to a person acquainted with the witness's address, has been unsuccessful in obtaining it, although the handwriting of the defendant, and the witness to the warrant of attorney is verified.

J. BAYLEY moved for leave to enter up judgment on an old warrant of attorney, more than seven years old. The peculiarity in the case was, that an affidavit by the

attesting witness could not be procured. The affidavit on which the application was founded, stated that the attesting witness was formerly a clerk in the office of the plaintiff's attorney, but his residence was now unknown. It then proceeded to state that an application had been made to a person to ascertain the address, and that he admitted that he was aware of the witness's address, which was at a considerable distance from London, but positively refused to state it, and alleged that he had reasons for not communicating that address. The affidavit then stated, that the signature as attesting witness to the warrant of attorney was the handwriting of the attesting witness in question. He cited *Young v. Showler* (a), in which it was held, that where the attesting witness to a warrant of attorney is the clerk of the attorney preparing it, the want of his affidavit on signing judgment, is sufficiently supplied by that of the master, verifying the handwriting of his clerk and of the defendant, and stating that the former has absconded, and cannot be found. That was clearly an authority for the present application. The affidavit in the present case swore to the handwriting of the defendant.

1840.

COPE
v.
LEA.

PATTERSON, J.—In the case cited, the affidavit was made by the master of the clerk, and the latter had absconded from his service, and it did not appear that it was known to any person where he was to be found. In the present case, however, it is known where he is, but the person who knows will not tell the deponent the address. It does not appear by the affidavit, either that any search has been made for the attesting witness. That is not sufficient. You must make more inquiry.

Rule refused.

(a) *Ante*, vol. 2, p. 556.



1840.

JAMES v. WESTDALE.

Service of a rule to compute on the shopman of the person in whose house the defendant resides, is insufficient.

LEAHY moved to make a rule absolute on an affidavit of service. The rule was to refer it to the Master, to compute principal and interest on a bill of exchange. The affidavit stated the service to have been effected on the shopman of the person in whose house the defendant resided.

PATTESON, J.—That is not sufficient. There is no privity between the shopman mentioned and the defendant. The rule should be served on a servant of the defendant himself.

Rule refused.

ELIAS v. ELLAS.

It is a sufficient answer to a rule for judgment as in case of a nonsuit, that the debt and costs have been paid after issue joined, and before the rule was obtained, although the payment has been made without the knowledge of the defendant's attorney.

MARTIN shewed cause against a rule nisi, obtained by *J. W. Smith* for judgment as in case of a nonsuit. He produced an affidavit, in which it was sworn that issue had been joined on the 10th of April, and the debt and costs were paid on the 14th of July, to the plaintiff. On this state of facts, the defendant ought not to have applied for this rule, and consequently it ought now to be discharged, and with costs.

J. W. Smith, in support of the rule, contended, that as it did not appear that the settlement had taken place until the 14th of July, it was probable that the default had taken place before the debt and costs were paid. Besides, it appeared that the arrangement described had been made behind the back of the defendant's attorney. In the case

of *Doe d. Draper v. Dyer* (a), the marginal note was, "In ejectment, it is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff's agent had been let into possession by the tenants, it not appearing that it was with the consent of the defendant, who was the landlord."

1840.

ELIAS

v.

ELIAS.

PATTERSON, J.—This rule must be discharged, and whether with costs or not is the only question. I do not see that the defendant's attorney could have any interest in the matter, except on the probability of success by the defendant. This is the application of the defendant himself, and not of the defendant's attorney. I think that the rule must be discharged, with costs.

Rule accordingly.

(a) *Ante*, vol. 3, p. 696.

BRIGGS v. SOWTON.

V. LEE moved for a new trial in this case, which had been tried before the under-sheriff of the county of Buckingham, on the ground that the defendant's attorney in the cause had acted as deputy for the under-sheriff in trying it. No other ground for the new trial was suggested. He cited the 1 Hen. 5, c. 4, which provided, "that no under-sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, be attorney in the King's Court, during the time that he is in office with any such sheriff." The statute of 22 Geo. 2, c. 46, which forbade under-sheriffs or their deputies, from acting as solicitors, attorneys, or agents, only applied to Courts of Quarter Session. The question was, whether the prohibition contained in the statute of Hen. 5, was an objection to the trial?

The fact of the person acting as deputy for the sheriff, being the attorney for the defendant, is not a ground for obtaining a new trial.

PATTERSON, J.—I do not think that is a ground for granting a rule for a new trial.

Rule refused.

1840.

VALE v. GANTER.

If the defendant has paid money into Court, pursuant to 7 & 8 Geo. 4, c. 71, the Court will not superadd an application to take that money out to a motion for a rule for judgment as in case of a nonsuit, but a separate motion must be made for that purpose, after the latter has been disposed of.

HOGGINS moved for a rule nisi, for judgment as in case of a nonsuit. He wished to make it a part of the rule, that the defendant should be at liberty to take the sum of 40*l.* out of Court, which had been paid in lieu of bail. In consequence of the plaintiff's delay, the defendant was deprived for an unlimited period of the use of the money which he had so paid in.

PATTESON, J.—You make these two applications in one motion. That is contrary to the practice of the Court. You could not make a motion to enter an exoneretur on the bail-piece, on the ground of the plaintiff's delay, until the rule for judgment as in case of a nonsuit, had been disposed of. The money paid into Court is in the same situation in this instance, as bail would be. You may take a rule nisi for judgment as in case of a nonsuit, but without that branch of the motion which refers to the taking money out of Court.

Rule accordingly (*a*).

(*a*) See *Bedolliere v. Ryan*, *Ante*, vol. 7, p. 615.

Ex parte EVANS.

Where an attorney being employed to sue a defendant, gave his undertaking for the debt sought to be recovered to his own client, the Court refused to enforce the fulfilment of that undertaking by attachment.

MARSHMAN applied for a rule to shew cause, why an attachment should not issue against an attorney, to compel him to fulfil his undertaking to pay a certain sum of money under these circumstances. It appeared, from the affidavits, that he had been employed by his client to sue a particular person for the recovery of a debt. The attorney accordingly wrote to the debtor, and having received an answer,

he informed his client that the debt was so safe, that he would give his undertaking to pay the amount. This undertaking he accordingly gave to his client. Two years had now elapsed since the undertaking had been given, and no money had been paid, either by the defendant or the attorney. Under these circumstances, it was submitted that the undertaking ought to be enforced by attachment.

1840.

Ex parte
EVANS.

PATTESON, J.—The attorney, in this case, gave his undertaking, not in his quality of attorney, but in his individual capacity. He received instructions to sue a particular person, and having written to him, he states to his client that he is certain the defendant will pay. He, therefore, gives his own undertaking to his client. That may be the subject of an action, but not of an attachment.

Rule refused (*a*).

(*a*) See *Walker v. Arlett*, *Ante*, vol. 1, p. 61.

ROBINSON v. EVRINGTON.

SWANN shewed cause against a rule nisi, obtained by *Humfrey*, for setting aside a declaration, and all subsequent proceedings, on the ground of irregularity. The writ had been issued, and described the action to be an action “on promises.” The declaration, which was filed, described the action as “on promises,” but the notice of declaration by mistake described the action to be “in debt.” The only objection, therefore, which could be sustained, was to the notice of declaration. The rule, therefore, asked for too much, in seeking to set aside the declaration. It should have been confined to the notice of declaration.

If a notice of a declaration varies, in describing the form of action, from the writ, the defendant may move to set aside the declaration, and need not confine his application to the notice.

Humfrey, in support of the rule, contended, that the de-

1840.
 ROBINSON
 v.
 EVRINGTON.

fendant had not asked for too much. He only knew of the contents of the declaration, by the notice which had been served upon him. That notice, in describing the form of action, stated it to be different from that which appeared in the writ. It must be presumed that the notice conformed to the declaration. The defendant, therefore, in seeking to set aside the declaration only, endeavoured to set aside a pleading which the plaintiff had led him to suppose varied from the writ.

PATTESON, J.—I think the rule does not ask too much, as the defendant has a right to give credit to the plaintiff for telling truth in his notice. The present rule must, therefore, be made absolute.

Rule absolute.

Ex parte KNIPE.

Where an attorney had omitted to take out his certificate for a year, after the expiration of his last certificate, and the last day of that year, (15th November,) was a Sunday, he having applied at the Stamp Office, to renew his certificate, on the 16th, but was refused, the Court allowed him to be re-admitted, without the usual notices, and without payment of

fine, or arrears of duty, he not having practised during the period of his being off the roll, and his application to be re-admitted being made on the 17th of November.

BUTT applied that a gentleman, named Knipe, an attorney, might be re-admitted without the usual notices, under the peculiar circumstances stated in the affidavit supporting the application. Mr. Knipe, it appeared, had been regularly admitted, and had taken out his annual certificate, down to the 15th of November, 1838, inclusive. He omitted to take out his certificate for the succeeding year. His annual certificate, therefore, expired on the 15th of November, 1839. He did not take out his certificate between the 15th of November, 1839, and the 16th of December, in the same year, and, therefore, although he would remain on the roll until the 15th of November, 1840, his certificate would only relate to the time of taking it out. Till the 15th of November, 1840, inclusive, he would have a right to take out his certificate. In the present year, the 15th of

November was on a Sunday. Mr. Knipe went to the Stamp Office on the 16th, and he was then informed that his application to take out his certificate should have been made on the previous Saturday, the 14th. Under these circumstances, it was submitted, that Mr. Knipe might be re-admitted without giving the usual notices. The day of this application was the 17th, and, therefore, Mr. Knipe had hardly been two days off the roll. He cited *Ex parte Minchin* (a), in which the Court allowed an attorney to be re-admitted, where he had been off the roll from the 15th to the 17th of November. In that case, the 15th of November, was not on a Sunday, and no application was made for the certificate until the 17th. The affidavit, however, did not deny that the applicant had practised during the uncertificated interval. The usual notice had been given to the Stamp Office.

1840.

Ex parte
KNIPE.

PATTESON, J.—The case of *Ex parte Minchin*, seems a stronger one than the present, and, therefore, I think the attorney may be re-admitted without the usual notices. As, however, it does not appear that he has not practised during the uncertificated interval, he must, as in the case of *Ex parte Minchin*, pay a fine of twenty shillings, and the arrears of duty.

Butt, on a subsequent day, produced an affidavit, in which the applicant swore that he had not practised during the uncertificated interval.

PATTESON, J.—Then he may be re-admitted without payment of fine, or of the arrears of duty.

Admitted accordingly.

(a) *Ante*, vol. 5, p. 253.

1810.

Where a clerk has been articulated to one of the members of a firm, and he covenants to serve him, a service with a partner, after the decease of the master, is not service under the articles, although the partner was a party to the articles.

Ex parte DALTON.

COLE moved that the above gentleman might be examined next Hilary Term, and that the service under his articles might be deemed sufficient. By the articles, Mr. Dalton, with the consent of his father, had bound himself to serve Mr. Goode, an attorney, at Dudley, for five years. Mr. Bolton, the partner of Mr. Goode, was a party to the articles, wherein it was stipulated that Mr. Dalton should serve Mr. Goode and his partner, for the time being, during the whole term; and that in the event of Mr. Goode's death during that period, Mr. Bolton, (who received half the premium,) would accept of an assignment, if then competent to take an articulated clerk. It appeared, by affidavit, that Mr. Dalton served Messrs. Goode and Bolton for three years and a half, that then Mr. Goode died, and Mr. Bolton continued the business. Mr. Dalton served Mr. Bolton for the residue of the term, but an assignment was not executed, until about three months after Mr. Goode's death. Under these circumstances, *Cole* submitted that the interval between Mr. Goode's death and the assignment might be reckoned; that it must be considered as a service under the articles, and that, in fact, no assignment whatever was necessary, although one was executed *ex majori cautela*.

PATTESON, J., after reading the articles, said, that they contained no binding contract to serve Mr. Bolton, in the event of Mr. Goode's death. Mr. Dalton's covenants were with Mr. Goode only. The parties evidently contemplated that an assignment should be executed.

Application refused.

1840.

WEEDON v. LIPMAN.

ATHERTON moved to make a rule to compute absolute. The affidavit of service, supporting the application, was peculiar. The deponent swore that he had left a copy with a female, at the house of the defendant, and who promised to give it to the defendant. The affidavit also stated that this female was one of the members of the defendant's family; but what was the relation between her and the defendant was not known.

Service of a rule to compute on a female who is sworn to be part of the defendant's family, and who promises to give the copy rule to the defendant, is sufficient.

PATTESON, J.—I think that service is sufficient, it being sworn that the female is part of the defendant's family.

Rule absolute.

See Luckie v. Buckley 22. & 23. C.P. 224.

BECK v. CLEAVER.

R. V. RICHARDS and *Miller* shewed cause against a rule nisi, obtained by *Macaulay*, for setting aside the verdict, which had been found in favour of the plaintiff, and for a new trial, on the ground of misdirection. It was an action by an attorney for the recovery of his bill of costs, and was tried before the under sheriff. The defendant pleaded, first, *nunquam indebitatus*; secondly, as to 4*l.*, a tender and payment into Court; thirdly, as to 3*l.* 15*s.* 8*d.*, that no signed bill had been delivered. It appeared that the bill was incurred in an action of *West v. Cleaver*. The present plaintiff, Beck, acted in that case as the attorney of Cleaver. The latter applied for an order in that action to change his attorney, Beck. He obtained the usual order on payment of costs, to be taxed by the Master. Before that officer it became a question as to when the retainer of the attorney was revoked, and, consequently, whether certain

In an action on an attorney's bill, plea, *nunquam indebitatus*, it is competent for the plaintiff to shew that a greater amount is due to him than the Master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause, in which the costs were incurred.

1840.

BECK
v.
CLEAVER.

items, amounting to the sum of 3*l*. 15*s*. 8*d*., ought to be allowed. The Master was of opinion that those sums ought to be disallowed, and accordingly gave his allocatur for the sum of 4*l*. The client, therefore, only tendered that sum. This was refused, and a signed bill, including the 4*l* and the 3*l*. 15*s*. 8*d*., was delivered. After the expiration of a month the present action was brought. Between the delivery of the bill and the bringing of the action no application was made to tax. On the trial of the action the same question was submitted to the jury, as to when the retainer was revoked. The assessor of the sheriff told the jury that the Master's allocatur was strong evidence as to what was due to the plaintiff, but it was not conclusive. The presumption was, that the jury thought the retainer was revoked at a time subsequent to the finding of the Master, and accordingly gave a verdict for the amount of the disputed items. The question turned upon the effect of the plea of *nunquam indebitatus*, and was, whether, under such a plea it was competent for the defendant to set up the Master's allocatur as conclusive on the plaintiff, with respect to the amount of his bill. It was submitted that he could not. The amount of the taxation by the Master might, in general, be conclusive on the parties, as to the amount due, but could not be so regarded on the plea of *nunquam indebitatus*. It might, as the assessor of the sheriff had said, be strong evidence that no more was due, but it was not conclusive. On this plea, however, the defendant had not placed himself in a situation to estop the plaintiff by the allocatur. In order to do so, he should have pleaded it; not having pleaded it, the allocatur only amounted to evidence. In *Vooght v. Winch* (a) it was held, that a verdict obtained by a defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury.

(a) 2 B. & Ald. 662.

So in *Sybray v. White* (a) it was held, that the finding of a miner's jury, coupled with the declaration of the defendant, was admissible in evidence against the latter, but the Court intimated very strongly that the finding of the jury was by no means conclusive upon the party. In *Outram v. Morewood and another* (b) it was held, that if a verdict be found, on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title. Here, Lord *Ellenborough* recognised the principle, that being pleaded, the verdict was an estoppel, but he did not decide, that if the plea of the defendant had been in the form of the present case, that it would have operated as an estoppel. For these reasons, it was submitted, that the direction of the sheriff's assessor was perfectly correct. It was to be observed, that this was not an order under 2 Geo. 2, but one made in the course of the cause. Granting that the Master's allocatur might be conclusive with respect to the reasonableness of the charges, it was not conclusive on a matter of fact, as to when the retainer was revoked. There was no undertaking on the part of the client on obtaining that order to pay what was due, and was not binding on both parties. The effect of the order was not to deprive the attorney of his right of action, but was merely a condition imposed on the client, as the terms of getting his papers delivered up. For these reasons, the present rule ought to be discharged.

1840.
 BECK
 v.
 CLEAVER.

Macaulay, in support of the rule, contended, that the Master's decision, of which the allocatur was evidence, must be considered as conclusive with respect to the amount of the debt due. When an attorney accepted the retainer of a client, the substance of the contract was that he should accept for his services what the Master, on taxation, found to be due. Here, the attorney had admitted the jurisdiction

(a) 1 M. & W. 435.

(b) 3 East, 346.

1840.

BECK
v.
CLEAVER.

of the Master, for he had attended the taxation. If he objected to it, he should have repudiated the taxation, or have applied to this Court to set it aside. In *Whitehead v. Tattersall* (a), a covenantor and a covenantee submitted the amount of damages accruing from a breach of covenant to an arbitrator. It was held, that in an action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached. So in the present case, there was nothing to impeach the allocatur. The amount found by it to be due must, therefore, be considered as conclusive upon the plaintiff as to what he was entitled to recover.

PATTESON, J.—It seems to me that the defendant has lost his advantage, by not doing anything between the delivery of the signed bill and the commencement of the action. I have considerable doubt whether such a taxation of the bill as this would be conclusive on either party. When the attorney delivered his bill, then the client should have applied to tax that bill; but if he thinks proper to let the month go by, and then plead in this form to the declaration, he has lost his opportunity of taxing the bill. Then comes the question, whether, under the plea of *nunquam indebitatus*, he can give in evidence the Master's allocatur, as conclusive on the plaintiff? If the defendant pleads such a plea, it seems to me that he opens the whole question as to the amount of the plaintiff's claim. I cannot say that either party is concluded by the amount of the allocatur, and, therefore, I am of opinion that the direction of the sheriff's assessor was right, and, consequently, that the present rule must be discharged.

Rule discharged.

(a) 1 Ad. & Ell. 491.

1840.

REGINA v. SOLLY and Another.

J. BAYLEY shewed cause against a rule nisi, obtained by *White*, which called upon the present overseers of the parish of Market Harborough, to shew cause, why a writ of certiorari, which had been directed to the justices of Leicestershire, to bring up an order made by them in quarter sessions, should not be quashed quia improvidè emanavit, and why the overseers should not pay the costs of this application. Several objections were made to the issuing of the certiorari, the principal of which was that it did not appear by the notice required, in order to obtain the certiorari, what were the names of the parties applying; secondly, that the notice was bad, as being signed by the attorney of the parties applying, and not by the parties themselves; thirdly, that it was signed by a gentleman, who assumed to be solicitor to all the parties, whereas he was only solicitor to the churchwardens. First, as to the objection to the mode of signing the notice. By the 13 Geo. 2, c. 18, s. 5, it was provided, "that no writ of certiorari shall be granted, issued forth, or allowed to remove any conviction, judgment, order, or other proceedings, had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such certiorari be moved or applied for within six calendar months next, after such conviction, judgment, order, or other proceedings, shall be so had or made, and unless it be duly proved upon oath, that the said party or parties suing forth the same, hath or have given six days' notice thereof in writing, to the justice or justices, or to two of them (if so many there be), by and before whom such conviction, judgment, order, or other proceedings shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew

A notice of application for a writ of certiorari signed in the name of a solicitor, who describes himself "solicitor for the present churchwardens and overseers of Market Harborough" is sufficiently signed, pursuant to 13 Geo. 2, c. 18, s. 5.

1840.
 REGINA
 v.
 SOLLY
 and Another.

cause, if he or they shall so think fit, against the issuing or granting such certiorari." It would be observed, that the act did not require that the notice should be signed at all. Here, however, it was signed by the attorney in his own name, and describing himself as "solicitor for the present churchwardens and overseers of Market Harborough." Then, as to the second objection, that the names of the parties applying for the certiorari were not stated. It was submitted, that it was not necessary that the christian and surname of the parties should be given. Two cases would be relied on by the other side, as shewing that the notice must be so signed. The first of those cases was *Rex v. The Justices of Lancashire (a)*. That case was clearly distinguishable from the present; for, the notice was there signed merely "Lace, Miller, and Lace, attorneys." From that signature it could not be known on whose behalf the notice was given. Here, however, the parties on behalf of whom the notice was given, were described. The other case was *Rex v. The Justices of Cambridgeshire (b)*. There, the notice was signed "Thomas Wilkin, one of the churchwardens of the said parish," and did not go on to state that it was given on behalf of the parish officers generally. That case was also very different from the present. With respect to the third point, that the solicitor was not authorised on behalf of the overseers and churchwardens, but merely on behalf of the churchwardens, the affidavits, in answer to the application, clearly shewed that he was duly authorised to proceed both on behalf of the overseers and the churchwardens. For these reasons, the present rule ought to be discharged.

White, in support of the rule, contended, that by a reasonable construction of the 13 Geo. 2, c. 18, s. 5, it was clear that the legislature intended that the names of the parties prosecuting the certiorari should be stated at the

(a) 4 B. & Ald. 289.

(b) 3 B. & Ad. 887.

foot of the notice. In conformity with this view was the decision in *Rex v. The Justices of Lancashire*. There, the Court said, "the notice should be given by the party suing out the writ, and that circumstance should appear upon the face of the notice itself, for the object of it, stated by the statute, is to enable the justices to shew cause against the granting the certiorari, and they may shew, for cause, that the party suing out the writ was a stranger to the county, and not interested in the order. The justices, therefore, ought to have their attention called to the name of the party by the notice itself." Again, in *Rex v. The Justices of Cambridgeshire*, Mr. Justice Parke said, "The justices might have had objections to Wilkin, as the person applying for this writ, which they would not have to the other parish officers; the notice, therefore, is calculated to mislead them. They are entitled to have true information of the parties intending to sue out the certiorari. It is said that this is, substantially, a notice on behalf of the other parish officers; but it may be tried by this criterion. The party suing out a certiorari (and by whom the notice ought to be given), is required to enter into recognizances for prosecuting it with effect, and for paying costs, before the writ shall be granted. Would the three parish officers have been bound to do so on this application? if not, the notice here is not given by the proper parties." If the test suggested by Mr. Justice Parke was applied to the present case, it must appear that the notice was insufficiently signed. In *Keate v. Goldstein (a)*, it was held, that where one of several defendants, in a proceeding by foreign attachment in the Mayor's Court in London, removes it by certiorari, he must put in bail in the King's Bench for all the defendants, otherwise a procedendo will be granted. There, Mr. Justice Bayley said, "Suppose the case of two persons being served with process out of an inferior Court; one of them sues out a writ of certiorari, and appears in the

1840.
 REGINA
 v.
 SOLLY
 and Another.

(a) 7 B. & C. 525.

1840.
 REGINA
 v.
 SOLLY
 and Another.

Court above for himself alone. The case is certainly not well removed, and that is, in fact, the very case before us. There is no hardship in this. The cause was commenced in the Court below, and the attempt to remove it fails, because both the defendants are not before this Court." With respect to the objection, that the solicitor was not duly authorised to appear on behalf of both churchwardens and overseers, it would appear, from the affidavits, that no sufficient authority was given by them to him.

Cur. adv. vult.

PATTESON, J.—The case of *Regina v. The Justices of Lancashire* (a), is an authority to shew that the signature by the solicitor is sufficient. Then I think, first, that the description of the parties, as overseers, without mentioning their names, they filling an official situation, is sufficient. The only question then, is, whether the parties gave him authority to appear? And I think that on these affidavits there can be no doubt that an authority was given. The present rule must, therefore, be discharged with costs.

Rule discharged, with costs.

(a) 3 P. & D. 86.

CHANNING v. CROSS.

In applying for a writ of *distringas*, it is not indispensably necessary that it should be sworn to be believed, that the defendant is keeping out of the way to avoid being served, if the facts disclosed in the affidavit, shew that the defendant is so doing.

WALLINGER moved for leave to issue a writ of *distringas*. The affidavit on which he applied, stated the usual number of calls to have been made pursuant to appointments, as well as a variety of other circumstances, which clearly shewed that the defendant was keeping out of the way to avoid being served with the writ of summons. No

served, if the facts disclosed in the affidavit, shew that the defendant is so doing.

statement, however, was contained in the affidavit, that the deponent believed the defendant to be keeping out of the way to avoid being served. The question was, whether such a clause ought necessarily to be introduced into the affidavit?

1840.
 CHANNING
 v.
 CROSS.

COLERIDGE, J.—That is not indispensably necessary. It is sufficient if it appears from the facts stated in the affidavit that the defendant is keeping out of the way to avoid being served?

Rule granted.

HAMER v. ANDERTON.

BUTT shewed cause against a rule nisi, obtained by *Humfrey*, for setting aside a demurrer, on the ground that it was frivolous. It was a demurrer to a replication to one of several pleas. The ground of the demurrer was, that the replication, which was *de injuriâ*, was a bad replication. The rule was drawn up on reading an affidavit, and a paper writing annexed. The paper writing contained a copy of the replications, the rejoinders, and the demurrer, but not of the declaration and of the pleas. As a preliminary objection it was urged that the rule ought to be drawn up on reading the whole of the pleadings. If the whole of the pleadings in the cause were not before the Court, it was impossible to judge whether the replication was good or bad, and, consequently, whether the demurrer was frivolous or not. In the case of *The South Eastern Railway v. Sprott* (a), the Court held, that a rule to strike out pleas must be drawn up on reading the declaration, and, therefore, discharged a rule which was not so drawn up.

A rule to set aside a demurrer to a replication as frivolous, must be drawn up on reading the plea as well as the subsequent pleadings in the cause.

(a) *Ante*, vol. 8, p. 493.

1840.

HAMER
v.
ANDERTON.

Humfrey, in support of the rule, contended, that enough of the pleadings was stated in the paper, on which the rule was drawn up to enable the Court to judge whether the demurrer was frivolous or not. This was all that was necessary, and the whole effect of the case cited was, that the Court would require the grounds of objection to be brought fully before the Court.

PATTESON, J.—The ground of demurrer is, that de injuriâ is not a good replication. How can I say that the demurrer is frivolous, unless I know what the plea contains? I do not see how I can unless the pleas are set out. It is unfortunate, but the rule must be discharged without costs.

Rule accordingly.

Ex parte Inhabitants of JARVIN.

The Court will not issue a mandamus to a Court of Quarter Sessions, commanding them to grant a case, although under special circumstances it may issue such a mandamus, commanding the sessions to state a case.

HAYES moved for a rule to shew cause, why a writ of mandamus should not issue to the recorder of Liverpool, commanding him to grant a case, on a certain appeal against an order of removal. It appeared, by the affidavits, that a removal had taken place, on an alleged settlement, by hiring and service. Against this order, an appeal was entered. At the hearing, only one witness was called on the part of the respondents. From his evidence it appeared, that the pauper had gone to his place on the day before new year's day, and left it the day after Christmas day, which was in pursuance of the express contract of hiring. This was the whole of the respondent's case. On the part of the appellants, it was submitted, that there was no evidence of a hiring and service for a year. It was also contended, that the respondents were bound to make out their case. Not having done so, the order must be quashed. The sessions,

however, confirmed the order. A case was then applied for, on behalf of the appellants. This was refused. The general proposition, that the granting a case was a matter for the discretion of the Court of Quarter Sessions, was not disputed, but the case of *Rex v. The Justices of Pembroke-shire* (a), was an authority to shew that, under certain special circumstances, such an application would be granted. The marginal note of that case was, that "when the sessions, on determining an appeal, have granted a case, but none has been stated, the Court will, under some circumstances, direct a mandamus to the justices who heard the appeal, to state a case." The facts of the case were, that after hearing the appeal, the Court, in that case, confirmed the order; but being requested to grant a case, did so in general terms, and without reference to any specific point. The attorneys could not agree in drawing up the case; and, upon their waiting on the chairman, in order that he might settle the statements which they had prepared, he said he could not sign any case by which it should not appear that the Court had decided in favour of the respondents, on the facts, independent of the law. The appellant's attorney declined taking a case so stated. Lord *Tenterden* there said, "the justices have confirmed the order, subject to a case. That is no confirmation, however, unless a case be stated. All that we can do, under the circumstances, is to require them to enter continuances and hear the appeal. I do not see how we can order them to state a case." Subsequently, the case of *Rex v. The Earl of Effingham and Others*, determined in H. T. 1782, which was a manuscript case, communicated by the late Mr. *Dealtry*, and in which the Court granted a mandamus to the justices present at the Bedford Sessions, in the West Riding of Yorkshire, to state a case. Lord *Tenterden* there said, "I admit there may be instances in which a mandamus may issue; but not that it ought to go on the present application. Here, the

1840.
 Ex parte
 Inhabitants of
 JARVIN.

(a) 2 B. & Adol. 391.

1840.
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 Ex parte
 Inhabitants of
 JARVIN.

cases if stated, could come to nothing. The facts are for the judgment of the sessions; and, under the circumstances disclosed, it would evidently be useless to call upon them for a case." Although in that case, therefore, the application had been refused, Lord *Tenterden* admitted, that under special circumstances, it might be granted. In the case of *Rex v. Effingham*, which was reported in a note to the case of *Rex v. The Justices of Pembrokeshire*, it appeared that the Court of Quarter Sessions had agreed to state a case, but by the interference of one of the magistrates on the bench, it was not stated. The Court of King's Bench afterwards ordered a mandamus to go for the purpose of compelling the Court of Quarter Sessions to state a case. These were the only instances, in which, under such circumstances, a writ of mandamus had been granted.

PATTESON, J.—It seems to me that the first case cited, *The King v. The Justices of Pembrokeshire*, is no authority for granting the rule. The case of *The King v. Effingham*, is only an authority to shew that the Court will, under special circumstances, grant a mandamus for the purpose of compelling the sessions to *state* a case, but not to *grant* it, that being a matter which is purely for their discretion. I cannot allow the rule prayed for to go.

Rule refused.

WILLIAMS v. ANDREWS.

An application for a new trial in a cause tried on a writ of trial, in Vacation, must be made within the first four days of the following term, and if the notes of the trial cannot be procured, an application must be made within the four days, for further time to make the application.

MONTAGUE SMITH moved, on the 7th November, for a new trial, in a cause which had been tried in vacation, before the recorder of Barnstaple. The question was, whether the application was in due time? It appeared that the country attorney was unable to procure the recorder's

notes of the trial cannot be procured, an application must be made within the four days, for further time to make the application.

notes, until it was so late that they did not arrive in town before the day previous, the 6th November. The reason of the notes not having been procured was, that the attorney in the country was unable to discover the residence of the learned recorder, he having no fixed place of abode. Under these circumstances, it was submitted, that the application was sufficiently early, as it was made as soon as the notes could be procured.

1840.
 WILLIAMS
 v.
 ANDREWS.

PATTERSON, J.—The application ought to have been made within the first four days of the Term. If the notes could not be procured in sufficient time, an application might have been made for further time, as in the case of *Thomas v. Edwards* (a). I cannot relax the rule, where parties do not choose to come forward in proper time.

Rule refused (b).

(a) *Ante*, vol. 2, p. 664.

(b) See *Wheeler v. Whitmore*, *ante*, vol. 4, p. 235.

WELSHAW v. BROWN.

M*MARTIN* moved to enter an appearance for the defendant, pursuant to the statute, after a writ of distringas had issued. The affidavit on which the application was founded, stated that the writ having been placed in the hands of the sheriff's officer, he proceeded to the residence of the defendant, for the purpose of executing it. On making inquiries there, he ascertained that the defendant was within his house, but that the house was locked up and secured in such a manner as to prevent an entrance being effected, so as to execute the writ. The only time at which the defendant came forth from his house, was on a Sunday;

Where a defendant, by fastening up his house prevents the sheriff from executing a writ of distringas, the Court will allow the plaintiff to enter an appearance for him, although the defendant is known to be within the house.

1840.

WISHAW

v.

BROWN.

on every other day of the week, no opportunity was afforded of executing the writ. The sheriff, of course, did not attempt to force an entrance at the outer door, as that would subject him to an action. All that the sheriff could do, therefore, had been done, in order to execute the writ.

PATTESON, J.—I think the affidavit discloses enough to authorize the plaintiff to enter an appearance for the defendant.

Rule granted.

MILSTEAD v. CRAUFIELD.

Where a cause in the Exchequer has been referred by a judge's order, and it is part of the order that it shall be made a rule of the Q. B., there is no objection to its being so made.

MONTAGU SMITH moved to make a judge's order, referring a cause, a rule of Court. The action was originally brought in the Court of Exchequer, and the parties had agreed by the order, that it should be made a rule of this Court. A motion for this purpose had already been made in the Court of Exchequer, and a rule nisi for the purpose of making it a rule of that Court, had already been granted, but not drawn up, as the parties were desirous of saving the expense of a rule absolute. It was submitted, that as the parties consented to make the order a rule of this Court, there could be no objection to the present application. The rule would be absolute in the first instance.

PATTESON, J.—(After consulting Master *Bunce*).—I understand this has been done before. If so, there is no reason for its not being done again.

Rule granted.

The QUEEN v. The JUSTICES of SUSSEX.

THIS was a rule for a mandamus, calling upon the justices of Sussex, to shew cause, why they should not enter continuances, and hear an appeal between the parishes of Dallington and Burwash, in that county. It appeared, from the affidavits on both sides, that an order of two justices had been made, for the removal of a pauper from the parish of Burwash to the parish of Dallington; that the parish officers of Burwash sent by post a copy of the order, and a copy of the examination on which the order was made, and also an original notice of chargeability to the parish officers of Dallington. The latter parish appealed against the order, and when the appeal was called on at the Quarter Sessions, the appellants commenced, by proving the service of a notice of appeal, which stated the ground of appeal to be, that the pauper had gained a settlement in the parish of Battle. The respondents objected to the reception of the notice, on several grounds, one of which was, that it was not stated that the settlement on which the appellants relied had been obtained subsequently to that which had been acquired in the appellant's parish; and, that the date of the order was not stated in the notice, and they required the appellants to prove the order of removal against which they appealed. The original order was not in Court, and no notice to produce it had been given to the respondents. The appellants then proposed to put in the copy which had been served upon them, and which had been filed by the clerk of the peace. This was objected to, as not being the best evidence; and the justices being of opinion that it was the duty of the appellants to produce the original order, or to shew that they had done what was necessary, to make secondary evidence of it admissible, dismissed the appeal.

On an appeal against an order of removal, it is the duty of the appellants to produce the original order, and if it is in the hands of the respondents, the appellants cannot put in evidence, the copy which has been served upon them, unless they have given notice to the respondents to produce the original.

S. Hughes, shewed cause, and contended, that the de-

1840.
 {
 The QUEEN
 v.
 The Justices of
 SUSSEX.

cision of the sessions was correct. The rule upon the subject was that laid down in *Dickinson's Justice of the Peace*: "The first step on the hearing of appeals against orders of removal, is proof of the notice of appeal by the appellants; unless it is admitted. The appellants should then produce the original order, unless it is already filed; or if a copy only has been served on them, they should, having given notice to the respondents to produce the original, produce and prove their copy. The order or the copy is then read; and any preliminary objections may be taken to its form." (a) The law is laid down in almost precisely similar terms in *Nolan's Poor Laws* (b). In the latter book, a case is referred of *Rex v. Kirkby Stephen* (c), which, though not an express decision upon the point, shews that at that time (1770), it was the practice for the appellants to give notice to the respondents to produce the original order. The law, as thus laid down, was, it was contended, correct in principle. The rule, that the best evidence must in all cases be given, scarcely admitted of an exception; and if the party whose duty it is to produce a certain document, in order to make out his case, has it not in his possession, he must subpoena the party who has it, with a subpoena duces tecum; or if the opposite party in the cause has it, proof of such possession must be given, and also that notice has been given to him to produce it. Upon an appeal, it is the duty of the appellant to shew the existence of an order, for, until that is done, the sessions having no original jurisdiction, but only a power to try appeals against orders, cannot properly proceed to hear the appeal. In the present case, the appellants having proved a notice of appeal against a supposed order, were called upon by the respondents to produce the order, and not being able to do so, or to prove a notice to the respondents to produce it, the justices were right to refuse

(a) *Dickinson's Justice*, by Serj. Talfourd, 4th edit. p. 757.

(b) 4th edit. vol. 2, p. 539.

(c) Burr. S. C. 664.

to admit the copy, which was only secondary evidence. He also cited *Doe dem. Phillips v. Morris* (a), where it was held, that where a document is in the hands of the opposite party, it is not enough, in order to enable the other party to give secondary evidence of its contents, to shew that it has been lost or destroyed, but notice to the opposite party to produce it must also be proved; and a late case of *Sharpe v. Lamb and Another* (b), where it was held, that an express admission by one party, that a particular paper is a copy of the original, does not dispense with the necessity of producing or accounting for the original.

1840.
 The QUEEN
 v.
 The Justices of
 SUSSEX.

Tyndale, in support of the rule, relied upon the 79th section of the new Poor Law Act (c), which directs, "that no poor person shall be removed under any order, until twenty-one days after notice of his being chargeable, accompanied by a copy or counterpart of the order, shall have been sent by the post or otherwise, by the overseers who obtained the order." This, it was contended, had the effect of making the copy good evidence against the party who sent it. Upon principle also, he contended, that a notice to produce was not necessary. There are three cases where such a notice is not necessary: first, to produce a notice; secondly, where there is a contemporaneous writing; thirdly, where, from the nature of the proceeding, it must be evident to the other party that the document will be required; as in *How v. Hall* (d), where, in an action of trover for a bond, the plaintiff was allowed to give parol evidence of the contents of the bond, though no notice to produce it had been given to the defendant; and the same rule prevails in the case of an indictment for stealing a bill of exchange or other document. *Rex v. Aickles* (e). Here, from the nature of

(a) 3 Ad. & Ell. 46.

(b) 3 P. & D. 454.

(c) 4 & 5 Wm. 4, c. 76.

(d) 14 East, 274, overruling
 the case of *Jolly v. Taylor*, 1 Esp.

50; where the contrary had been
 held by Lord Kenyon at Nisi
 Prius, and confirmed in banc.

(e) 1 Leach, 330.

1840.
 The QUEEN
 v.
 The Justices of
 SUSSEX.

the proceeding, the defendant ought to have been prepared to produce the original.

Cur. adv. vult.

PATTESON, J. afterwards (Nov. 23), gave judgment. It is laid down in *Burn's Justice*, title "*Sessions of the Peace*," that in appeals against orders of removal, the appellants must produce the original order of removal; or "if only a copy of the order is served, the appellants should give notice to the removing parish to produce the original at the hearing." No authority is there cited for this position. The Court of Quarter Sessions, in the present case, acted upon such practice; and the questions are, whether they were right in so doing; and if not, whether this Court can interfere by mandamus? If the production of the order of removal, or a copy thereof after notice, be considered as evidence given by the appellants in the course of the hearing of the appeal, this Court cannot interfere, as was held in *Rex v. The Justices of Frieston (a)*, and other cases, and it is unnecessary to consider the effect of the cases cited by the learned counsel for the appellants, as to actions on attorney's bills, and actions of trover and indictments for forgery. But, if the production of the order, or a copy after notice, be a preliminary matter of practice, like a notice of appeal, and similar matters, then this Court will interfere if they think the sessions wrong, as was held in *Rex v. The Justices of the West Riding of Yorkshire (b)*. I think that this is a case of the latter description, and that this Court has power to inquire into the matter. I find nothing to contradict the passage in *Burn's Justice* as to the practice on the old poor law, nor can I see anything unreasonable in it, and therefore I think that the case is reduced to the simple question, whether the statute 4 & 5 Wm. 4, c. 76, ss. 79 and 81, has altered the law so materially as to render the practice no longer applicable or legal? The 79th sec-

(a) 5 B. & Ad. 597.

(b) 5 B. & Ad. 667.

tion of the act directs, that the removing parish shall give notice of chargeability, accompanied with a copy or counterpart of the order of removal. This is all, and I do not see that it imposes any new duty on either party, as regards proceedings at the sessions, or gives any effect to the orders of removal, or a copy different from what they had before the statute was passed. Under these circumstances, I do not think that the sessions have come to a wrong conclusion, and am of opinion that I cannot interfere with it, and that this rule must be discharged.

1840.
 The QUEEN
 v.
 The Justices of
 SUSSEX.

Rule discharged.

REGINA v. GREGORY.

MILLER moved for a certiorari, and for a rule to shew cause, why the defendant, who was committed on a charge of felony, should not be bailed by the magistrates in the country. In support of the application no affidavit of the defendant's poverty was produced. The usual practice was formerly to produce such an affidavit, where a party was so poor as to be unable to bear the expense of being brought by habeas corpus before the Court. In several instances latterly the Court had dispensed with the production of such an affidavit. If, on consideration of the affidavits already produced, the Court should be of opinion that the rule ought to be granted in other respects, the absence of the affidavit in question would form no ground of objection.

The Court will grant a rule nisi for bailing in the country, a party charged with a felony without the production of an affidavit of his poverty.

PATTESON, J. (having consulted with the officers of the Crown Office.)—I think that the rule may be granted without the production of such an affidavit.

Rule granted (a).

(a) See *Rex v. Booker*, ante, vol. 2, p. 446.

1840.

MORRIS v. BEDWARD.

An affidavit of service, pursuant to Reg. Gen., T. T., 3 Vict., is sufficient, if the service is sworn to have been effected "on the attorney or agent for the plaintiff in this cause."

BERE moved to make a judge's order a rule of Court, and, pursuant to Reg. Gen., T. T., 3 Vict., to make the costs of the rule of making the order a rule of Court a part of the rule of Court for so making it. The words of the rule were,—“It is ordered by the judges, that when a judge's order is made a rule of Court, it shall be a part of the rule of Court that the costs of making the order a rule of Court shall be paid by the party against whom the order is made, provided an affidavit be made and filed, that the order has been served on the party, or his attorney, and disobeyed” (a). The affidavit on which the application was made, stated the service of the order to have been “on Mr. Deane, the attorney or agent for the plaintiff in this cause.” The judge's order was in the usual form, “on hearing the attorneys or agents.” The question was, whether the service so disclosed by the affidavit was sufficient?

PATTESON, J.—I understand the point has been before the officers of the other Courts, and they think that the service ought to be on the attorney, and not on the agent. I do not see why that should be necessary. I will, however, consider the point.

Cur. adv. vult.

PATTESON, J.—I have considered the point, and I think the affidavit of service is sufficient.

Rule accordingly.

(a) There is a similar rule in Exchequer. See *The Queen v. Gainson*, ante, vol. 8, p. 795.

1840.

Doe dem. **NEWMAN v. ROE.**

BALL moved for judgment against the casual ejector. The peculiarity in the case was, that the declaration was entitled of Trinity Term, 4th Vict., and there was no date to the notice at the foot of the declaration. He cited *Doe d. Crooks v. Roe (a)*. There, the declaration in ejectment was entitled of Trinity Term, 1st Vict., and that term had not arrived, and the Court granted a rule for judgment against the casual ejector, the notice at the foot of the declaration being correct. So in the present case, Trinity Term, 4th Vict. had not arrived.

A declaration in ejectment being entitled of T. T., 4 Vict., such term not having arrived, and no date being affixed to the notice at the foot of the declaration, the Court refused to grant a rule for judgment against the casual ejector.

PATTESON, J.—I think that is not enough. The present case is distinguishable from the one cited, for there, the notice at the foot of the declaration was sufficient to inform the tenant when he was to appear.

Rule refused.

(a) *Ante*, vol. 6, p. 184.

WALKER v. LUMB.

ADDISON shewed cause against a rule nisi, obtained by *Hoggins*, to set aside the order made in this case by Mr. Justice *Erskine*, for arresting the defendant. A preliminary objection might be taken, that the rule was moved for too late. The arrest took place on the 21st of October, and the time for putting in bail expired on the 29th. The defendant, therefore, should have applied to a judge at Chambers, in order to obtain the relief to which he claimed to be entitled under 1 & 2 Vict. c. 110, s. 6. In the case of *Sugars*

Where a defendant who has been arrested by a judge's order, pursuant to 1 & 2 Vict. c. 110, s. 3, seeks to obtain his discharge pursuant to section 7, on the ground of a substantial objection to his arrest, he is not

bound to apply before the expiration of the time for putting in bail.

It seems, that if the defendant gives a satisfactory explanation of the facts which have led to his arrest, the plaintiff ought, in answer to his application for discharge, to disprove that explanation.

1840.

WALKER

v.
LUMB.

v. *Coucanen* (a), the Court intimated that such an application as the present ought to be made within the time for putting in bail. There, the application was to set aside the bail-bond, on the ground of an irregularity in the copy of the *capias* served. The application in the present case, however, was not made until the 2nd of November.

PATTESON, J.—I think there might be a distinction in this case, and one where the application is made on the ground of irregularity. This application is made on the merits. I think the application is not too late.

Addison then proceeded to the facts of the case. The order for the arrest was obtained from Mr. Justice *Erskine*, on the affidavit of the plaintiff, who swore to the debt, and of a person named James Gawk Roger, who stated that the defendant was about to leave the kingdom. The ground of making this statement by Gawk Roger was, that the defendant had informed the deponent that he was about to leave the kingdom as soon as he could turn his machinery into money. It was sworn also, that the defendant's machinery had been subsequently sold by auction. In support of the rule, it was denied by the defendant that he had made the statement as to his intention to abscond, to the witness Gawk Roger. That being merely oath against oath, was no ground for discharging the defendant, as there could be no ground for believing him rather than the witness. Then he swore that he had no intention to leave the country. If that was held sufficient, such an affidavit could always be made, and thus render nugatory the power contained in the statute. If he had sworn that he did not owe the debt, that would not be sufficient. If not, how could a contradiction by the defendant, as to his intention to leave the country? The plaintiff's witness, of course, did not again state what the defendant had said to him, as

(a) 5 M. & W. 30.

that was merely a reiteration of an affidavit already on the files of the Court. It was then sworn by the defendant, that although he had sold his machinery, he had applied the proceeds to the payment of his creditors. This statement, however, did not at all contradict what had been sworn on the part of the plaintiff. No necessity, therefore, existed for the plaintiff making any answer to that statement.

1840.

WALKER

v.
LUMB.

PATTESON, J.—With respect to the time within which such an application as the present should be made, it is observed by Mr. *Lush*, in his *Practice*, page 606, that “when the complaint is founded on an irregularity, the application must, as before, be made within the time allowed for putting in bail, and before any fresh step with regard to these proceedings has been taken. But where it is founded on a material defect in, or, as it would seem, on the falsity of the affidavit, the defendant may, perhaps, apply at any time while the suit is pending.” He cites for this latter proposition *Newton v. Harland*, 3 *Jurist*, 679. I think that is a sound distinction, and, therefore, the present application is not too late.

Hoggins, in support of the rule, contended, that the explanation on the part of the defendant of the steps taken by him as to his machinery, being unanswered by the plaintiff, it stood entirely unimpeached. Being so, a sufficient ground was furnished for discharging the defendant out of custody. The plaintiff was bound to answer the statement made by the defendant, if it was in his power. An opinion to that effect was expressed by Mr. Justice *Coleridge*, in the case of *Harvey v. O'Meara* (a). There, his Lordship said, that the plaintiff “has had the opportunity of examining into the truth of these statements of the defendant, and has not been able to contradict them, nor does he swear to

(a) *Ante*, vol. 7, p. 725.

1840.

WALKER

v.
LUMB.

any preparations which are now making on behalf of the defendant for leaving the country." In the present case, an opportunity had been afforded to the plaintiff to inquire into the facts stated in the defendant's affidavit, and no contradiction had been given to it. If such statements as those, on the authority of which the order for the defendant's arrest was made, were to be considered sufficient, nothing would be easier than for any person to swear to such expressions as those imputed to the defendant, and he might at once be made a bankrupt, because he could not get out of custody during a period of twenty-one days. Under these circumstances, it was contended, that the present rule ought to be made absolute.

PATTESON, J.—The order for the *capias* in this case was originally made on the ground of an assertion attributed to the defendant by a witness on behalf of the plaintiff. Now, language is so uncertain, that it may be twisted in any way. It appears, that there has been a sale of the defendant's goods; but the plaintiff, instead of bringing the fact of the sale before the Court, produces an affidavit, by which it is sworn, that the statement in question was made by the defendant. I am far from saying that the defendant should be capable of discharging himself, by merely swearing that he has no intention to go abroad. I do not mean to say that that is sufficient, as, if it was, it would frustrate the object of the act of Parliament. But when the defendant says that he has sold his goods, and applied the proceeds in paying his creditors, and the plaintiff does not answer that affidavit, I think there is enough shewn to authorise me in making this rule absolute. The present rule will, therefore, be absolute, with costs.

Rule absolute, with costs.



1840.

REGINA v. BUTCHER.

CLARKSON applied for a writ of certiorari, to remove an indictment from the Central Criminal Court, for obtaining money under false pretences. The indictment was founded on 7 & 8 Geo. 4, c. 29, s. 53. The words of that section were,—“ And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud; for remedy thereof be it enacted, that if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years; or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award: Provided always, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removeable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.” It seemed very doubtful whether, after this provision, the Court had power to remove an indictment from the Central Criminal Court by certiorari. The question, in fact, was, whether the words which took away the certiorari were to be confined in their meaning to cases where the facts in evidence amounted to larceny, or extended to all indictments for obtaining money under false pretences?

The certiorari in all indictments for obtaining money by any false pretence, is taken away by 7 & 8 Geo. 4, c. 29, s. 53.

PATTESON, J.—I do not see how to get out of the words of the act. They must mean such an indictment as has

1840.
 REGINA
 v.
 BUTCHER.

just been described, which is an indictment for a misdemeanor. The whole section must be taken to apply generally to indictments for misdemeanor, in obtaining money by any false pretence. I cannot, therefore, grant the rule for a certiorari.

Rule refused.

BEARD v. M'CARTHY.

Where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to recover interlocutory costs in that action which have not been set off on taxation.

JOHNSON shewed cause against a rule nisi, obtained by *Heaton*, for making a judge's order a rule of Court. It appeared, from the affidavits, that this action had been commenced by a writ of summons; and, on the ground of irregularity, the service of the writ had been set aside by a judge's order, with costs. They were taxed at the sum of 2*l.* 5*s.* A fresh service of the writ was effected, and the plaintiff having continued the cause down to the time of signing judgment, a taxation of the costs in the cause took place. The defendant attended the taxation, but did not require the interlocutory costs, already the subject of a judge's order, to be set off against the plaintiff's costs in the cause, and they were accordingly not set off. The plaintiff afterwards signed judgment, issued a *capias ad satisfaciendum*, and took the defendant in execution. The present application was now made for the purpose of obtaining the costs due to the defendant under the judge's order. *Johnson* now contended, that as the defendant might, under 1 Reg. Gen., H. T., 2 Wm. 4, s. 93 (*a*), have set off the interlocutory costs directed to be paid by the judge's order, he was bound to do so. If the plaintiff did not allow them on taxation to be set off, an application might have been made to review the taxation. The present application, therefore, was misconceived, as, if the defendant had any

(*a*) *Ante*, vol. 1, p. 196.

remedy, it was by moving to set aside the taxation. Perhaps it would be contended, on the other side, that the defendant, having been taken in execution, the plaintiff's claim was satisfied, and, therefore, the defendant was entitled to obtain his interlocutory costs. The plaintiff had no objection that the defendant should be discharged, if he would pay the amount of the damages and costs in the action, diminished by the sum directed to be paid by the judge's order.

1840.
BEARD
v.
M'CARTHY.

Heaton, in support of the rule, contended, that the provisions of 1 Reg. Gen., H. T., 2 W. 4, s. 93, with respect to interlocutory costs, were not compulsory, but merely left it to the discretion of the defendant whether he would set off the costs or not. Not being compulsory, and the defendant not having set off his costs, and the plaintiff having, by taking the body of the defendant in execution, satisfied the judgment, the defendant's claim still remained in force. He was, consequently, entitled to have the present rule made absolute, in order to obtain the costs pursuant to a judge's order.

LITTLEDALE, J.—The plaintiff's damages and costs in the action have been satisfied by taking the body of the defendant in execution. The defendant, therefore, is entitled to have from the plaintiff the costs owing to him under the judge's order.

Cur. adv. vult.

LITTLEDALE, J.—This was an application, in which a question arose as to setting off interlocutory costs. In the course of the cause, certain interlocutory costs were ordered to be paid by the plaintiff to the defendant. Subsequently, the plaintiff proceeded to judgment, and took the defendant in execution. The latter now applies to the Court for the purpose of obtaining payment of these interlocutory costs. It appears, that the plaintiff is willing to set off these costs,

1840.
 BEARD
 v.
 M'CARTHY.

and he contends, that as there will be no prejudice to the attorney's lien, he is at liberty to do so. To this the defendant objects, as he is not bound to set off those costs, on the same principle, that in the ordinary case of an action, a defendant is not bound to set off a debt due from the plaintiff. The defendant also contends, that by taking him in execution, the debt and costs, for which judgment was signed, are as fully satisfied as if there had been actual payment of them to the plaintiff. It seems to me, that taking the defendant in execution, is the same as if the defendant had paid the debt and costs; and, consequently, that the defendant is not bound to allow his costs to be set off against the debt and costs recovered by the judgment. I think the present rule must, therefore, be made absolute.

Rule absolute.

FAULKNER and Another v. HASLAR.

Service on one of two plaintiffs, who undertakes to accept on behalf of both, is sufficient to entitle a defendant to his discharge, under 48 Geo. 3, c. 123.

BLAIR moved to discharge a defendant out of custody, pursuant to 48 G. 3, c. 123, he having remained in prison during twelve successive calendar months, for a debt not exceeding 20*l*. The affidavit of service, on which the application was founded, stated the service of the notice to have been effected on one of the two plaintiffs, who stated that he would accept the service on behalf of both, and that the other need not be served. This, it was submitted, amounted to a sufficient service to entitle the defendant to his discharge.

PATTESON, J.—I think that is sufficient.

Rule granted (a).

(a) See *Doe d. Smith v. Payton*, ante, vol. 7, p. 671.

1840.

WAITE v. COOK.

WOLLASTON applied, on behalf of the plaintiff, for leave to enter an appearance for the defendant, pursuant to 2 Wm. 4, c. 39, s. 3. A writ of summons had been issued against the defendant, and he not appearing, a writ of *distringas* was sued out and lodged with the sheriff. To this writ, the sheriff returned *non est inventus* and *nulla bona*. The instructions, on which this application was founded, set forth the sheriff's return, but did not contain any affidavit from the sheriff's officer, stating the efforts which had been made to execute the process.

A sheriff's return of *non est inventus*, and *nulla bona*, to a writ of *distringas* is not sufficient, but an affidavit must be produced by the sheriff's officer, stating what effects had been made to execute the writ.

PATTESON, J.—That is not sufficient. Very early after the passing of that statute, the Courts determined that they would not allow an appearance to be entered merely on production of the sheriff's return. There must be an affidavit of the sheriff's officer, to shew what attempts have been made to execute the writ.

Rule refused (*a*).

(*a*) See *Daniels v. Varsity*, ante, vol. 3, p. 26; 1 Chit. Arch. Prac. p. 131, 7th Ed.

 QUILTERS v. NEELY.

ATHERTON shewed cause against a rule nisi, obtained by *James*, for setting aside a writ of *distringas*. It had been executed on the 28th of August, and the present rule was obtained on the 10th of November. The objection was, that in the teste of the copy served, the date was omitted. This objection only amounted to an irregularity, and, therefore, after such a lapse of time between the service and the application, the defendant must be considered as

Where a copy of *distringas*, in the teste of which, the date was omitted, was served on the 28th of August, it was held to be too late to take advantage of the omission on the 10th of November.

1840.
 {
 QUILTERS
 v.
 NEELY.

too late in applying. In *Wright v. Warren* (a), it was held, that if a defendant seeks to set aside the service of a writ of distringas, on the ground of defective indorsements and variance from the summons, his application is too late after a lapse of eighteen days. Here the lapse of time was much greater than eighteen days, and, therefore, the defendant was completely out of time.

James, in support of the rule, contended, that the case cited on the other side was not an authority against the application. There, the objection was merely to the want of indorsements on the writ. The omission of them could only constitute an irregularity, because the writ of distringas was complete without the indorsements. The omission of the teste, however, rendered the writ a nullity. Previous to the Statute of Frauds (29 Car. 2, c. 3, s. 16), goods were bound from the date of the teste of the writ (b); and in extents in chief, which were at the suit of the Crown, they took place inter se, according to their teste (c). The provisions of 2 Wm. 4, c. 39, s. 3, clearly rendered the teste essential to the writ. The words of the section as to the teste were,—“ And every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof, and shall bear teste on the day of the issuing thereof, whether in term or vacation.” If the date of the teste was not stated in the writ, there was no means of calculating whether the fifteen days had elapsed between the teste and the return day. It would be quite possible, if the plaintiff was allowed to omit the date in the teste, to make it returnable the day after it was issued, instead of waiting the fifteen days provided by the statute. The provisions of the section might, therefore, be completely set at defiance. Without the date stated in the teste, therefore, the distringas could be considered as no writ. If the date could be left out, the name of the Chief

(a) *Ante*, vol. 2, p. 724.

1 Salk. 320.

(b) *Smallcomb v. Buckingham*.

(c) 2 Tidd. Prac. 1059, Ed. 9.

Justice might be left out. If that could be omitted, it was difficult to say what might not be omitted. No case had decided that the date of the teste could be omitted, or that its omission might be treated as an irregularity. Not being an irregularity, it rendered the *distringas* in question a nullity; being a nullity, it could not be waived by mere delay in applying to set it aside.

1840.
 QUILTERS
 v.
 NEELY.

PATTERSON, J.—If it had appeared that the defect existed in the writ itself, I should have said that it was no writ at all. But this is a mere defective copy which has been served, and, therefore, only constituting an irregularity. The lapse of time, therefore, between the 28th of August, the date of the service, and the 10th of November, the date of obtaining the rule nisi in this case, it appears to me has waived the objection. The rule was moved with costs, and therefore must be discharged with costs.

Rule discharged, with costs (a).

(a) See 10 Reg. Gen., M. T., 3 Wm. 4, *ante*, vol. 1, p. 473, by which it is ordered, "That if the plaintiff, or his attorney, shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by the said act to be by him inserted therein, or indorsed thereon, such writ or copy thereof, shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court, out of which the same shall issue, or to any judge."

FELLINGHAM v. SPARROW.

HEATON shewed cause against a rule nisi, obtained by Thomas, for setting aside the verdict found for the plaintiff in this case, before the sheriff of Middlesex, and entering a nonsuit, or for a new trial. The ground of the application was, that an objection to the competency of a material wit-

Where a witness has been called, and after he has been dismissed by the party calling him, it is discovered, from private

information, that the witness is incompetent, from interest, and the party, for whom he appears, re-calls him merely to inquire as to the existence of his interest, the objection to the incompetency will not be allowed to prevail.

1840.
FELLINGHAM
v.
SPARROW.

ness had not been allowed. The facts of the case were these. It was an action for an attorney's bill, and one witness was called in support of the plaintiff's case. He was examined in chief, cross-examined, re-examined, and dismissed. The defendant's counsel ascertained, by private information, that the witness was incompetent, on the ground of interest. It was then suggested, that the evidence of the witness ought to be struck out of the sheriff's notes. The plaintiff's counsel objected to this, but recalled the witness to ascertain the fact, whether he was interested or not. The under-sheriff refused to strike out the evidence, and the plaintiff obtained a verdict. *Heaton* contended, that the objection was taken too late, as the witness had been finally dismissed by both counsel. With respect to the fact of the witness being recalled, as that was merely for the purpose of inquiring as to the objection with respect to the competency of the witness, it did not authorize the defendant to support the objection. He cited *Beeching and others v. Gower (a)*, in which it was held, that where a witness, after his examination, has been dismissed from the box, his competency is not to be questioned.

Thomas, in support of the rule, submitted, that as the witness was recalled by the plaintiff, although for the purpose of inquiring into the competency of the witness, he must be considered as having been recalled for the general purposes of the cause; and, therefore, the objection to the competency having been taken before the examination was ended, it must be considered as having been taken in due time. The evidence of the witness, therefore, ought to have been struck out of the under-sheriff's note. If it had been, then, as no other witness was called to support the plaintiff's case, he ought to be nonsuited.

PATTESON, J.—If the plaintiff recalled the witness for the

(a) Holt's N. P. 314.

general purposes of the cause, independent of this objection, then there can be no doubt that it was taken in time. I will, however, consider the matter.

1840.
FELLINGHAM
v.
SPARROW.

Cur. adv. vult.

PATTESON, J.—I am quite clear that the objection in this case was taken too late, and that the sheriff ought not to have nonsuited the plaintiff. Calling the witness back afterwards did not cure the fault of the party in not taking the objection in time. It is the duty of a party making an objection to the competency of a witness, if he knows of the objection, to take it before the witness is examined in chief; but if he does not know it then, he must take it the moment it appears. If it is not taken, and the witness is suffered to leave the box, the objection cannot be taken afterwards. The present rule must, therefore, be discharged.

Rule discharged.

JONES v. LEWIS.

CHILTON and *V. Williams* shewed cause against a rule nisi, obtained by *Nichol*, for the purpose of setting aside a writ of inquiry, on the ground of misdirection by the under-sheriff. It was an action against the defendant, who was an attorney, for his negligence in not appearing to defend three actions brought against the now plaintiff, in consequence of which a verdict passed against the plaintiff, and he was taken in execution. The declaration contained three counts, all in the same form, only adapted to each particular action in which the alleged negligence took place. The material allegations, so far as amount on the part of the plaintiff has been incurred, in consequence of the alleged negligence.

Where a plaintiff in an action against an attorney, for negligence in the conduct of a suit, alleges that he was "forced to pay" certain sums in consequence of the defendant's negligence, he can only recover the amount actually paid by him, although a liability to a greater

1840.

JONES

v.

LEWIS.

the present application was concerned, were as follows: "And the said J. N., then recovered a verdict in the said action against the now plaintiff, for a large sum, to wit, 6*l.* 10*s.*; and the now plaintiff was afterwards, to wit, on, &c., *forced to pay* the same, and a large sum, to wit, 23*l.* 19*s.* 6*d.* for the costs of the said J. N., in prosecuting the said action, and thereby also the now plaintiff then paid, and became subject to divers costs and expenses, to wit, 100*l.*, in attempting to defend the said action and incidental thereto." The plaintiff, at the trial, proved the verdicts, and the amount of costs taxed, which formed a total of 74*l.* 14*s.* 6*d.* Proof was also given that three rules for new trials had been obtained, and discharged with costs. The plaintiff's costs were stated to amount to 30*l.*, but no evidence was given of the amount of costs which the plaintiff would be liable to pay to the defendant, for conducting the defences in the original actions. It was shewn that the plaintiffs in those actions had issued executions, under which the sheriff seized all the goods and chattels belonging to the now plaintiff. The fruits of the levy amounted to 26*l.*, and that was all the now plaintiff had ever paid. In summing up, the under-sheriff directed the jury, that the material question for them to consider, was, the now plaintiff's liability to pay under the verdicts, recovered against him, and not the amount which he had actually paid; and that they were at liberty, if they chose, to find a verdict in favour of the plaintiff, for the full amount of the verdicts and costs, as well as the costs of the three rules which had been obtained and discharged. The jury, after some consideration, returned a verdict in favour of the plaintiff, for 80*l.* The present rule was obtained, on the ground, that the before mentioned direction of the under-sheriff to the jury was wrong. It was said, that on the allegations contained in this declaration, the jury were only at liberty to find in favour of the plaintiff, for the amount actually proved to have been paid by the

plaintiff. It was to be observed, that at the execution of the writ of inquiry, no such objection was made to the mode in which the under-sheriff had left the case to the jury.

1840.

JONES

v.

LEWIS.

R. V. Richards objected that what passed at the execution of the writ of inquiry, could not be stated to the Court.

COLERIDGE, J.—This is like a new trial, and, therefore, if a misdirection by the sheriff is relied on, I can hear, from the counsel in the cause, the statement made as to what passed at the trial.

Chilton and V. Williams. No such objection was taken before the under-sheriff. The form of the present declaration was quite sufficient to support the verdict found by the jury. The statements of the different sums of 6*l.* 10*s.*, 23*l.* 19*s.* 6*d.*, and 100*l.*, were not special damage necessary to be proved as laid, but were general damage resulting from the misconduct of the defendant. A general statement of damage would have been sufficient to support the plaintiff's right of action, without specifying the particulars, in the manner herein set forth. The payment of the sums here stated was the necessary consequence of the defendant's negligence. Being such necessary consequence, the jury were at liberty to give a verdict for that amount, without their being stated as special damage. If so, stating them as special damage could not deprive the plaintiff of his right to recover them. The object of alleging special damage was, that when a party claimed it, the defendant might not be taken by surprise. But, when the plaintiff relied merely on the ordinary consequences resulting from the injury alleged, it was not necessary to state special damage. This principle was recognized in the case of *Ward v. Smith* (a). That was an action for a breach of an

(a) 11 Price, 19.

1840.

JONES

v.
LEWIS.

agreement, to let certain premises; and it was held, that in such an action, the plaintiff was at liberty to give evidence of particular loss sustained by breach of the agreement; although he had stated it generally in his declaration. Evidence therefore, of loss of business, by plaintiff's wife, in her trade of milliner, was held admissible as evidence of general damage, although no special damage, on that ground, was laid in the declaration, nor any customers' names, nor any averment of her business, introduced. Again, in the case of *Boorman v. Nash*, (a) where a person, who had contracted for a certain quantity of oil, to be delivered to him at a future day, at a certain price, became bankrupt before that day arrived, and obtained his certificate, the Court held, that he was nevertheless liable to an action for not accepting and paying for the oil; and the proper measure of damages was the difference between the price that he had contracted to pay for the oil, and the market price, at the time when the contract was broken. There, Lord *Tenterden* said, "Although it is not specially alleged in the declaration that the goods were of less value when the contract was broken, yet as the damage sustained by the fall of the market, necessarily resulted from the defendant's breach of contract, that damage may be recovered under the declaration in its present form." That case was precisely in point. In this case, the damages were the necessary result of the breach of contract. It might be said, non constat, that there was a judgment in this case: so, non constat, that there was a fall in the market price in that case. In *Dixon v. Bell* (b) it was held, that in an action for wounding the plaintiff's son, per quod servitium amisit, the plaintiff is entitled to recover the amount of the surgeon's bill, although it has not been paid. There, Lord *Ellenborough* said, "That as to the surgeon's bill, the jury were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt."

(a) 9 B. & C. 145.

(b) 1 Stark. 287.

In moving for the rule, the case of *Pritchett v. Boevey* (a) was cited. The marginal note of that case, was, "A. having been legally arrested on mesne process, applied to the Court to be discharged. The rule was referred to a judge at Chambers, who ordered him to be discharged, and would have given him the costs of the rule if he would have undertaken to bring no action; but, as he refused to give such undertaking, nothing was ordered as to costs. In an action of trespass and false imprisonment brought by A. for the arrest; it was held, first, that he was entitled to recover those costs as special damage, if properly laid in his declaration; and, secondly, that, as the declaration only alleged that he had been forced and obliged to pay, and had paid C., he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them, but that he might recover so much of the bill of costs as consisted of money actually paid by the attorney, as that might be considered as money paid by him through his agent." That case was, however, distinguishable from the present, for, in an action for false imprisonment, the deprivation of the defendant's liberty was the gist of the action, therefore, the payment of costs was not the necessary consequence of that deprivation of liberty. Here, however, the loss of these costs was the necessary consequence of the negligence alleged on the part of the defendant. It was on that principle, that Lord *Ellenborough* decided, in the case of *Dixon v. Bell*, already cited. The allegation at the latter part of the declaration, that the plaintiff then paid and became subject to divers costs and expenses, was quite sufficient to admit the evidence as to the plaintiff's liability to pay the costs of moving for new trials, in consequence of the defendant's negligence. The two allegations need not both be proved. It was sufficient if the plaintiff gave evidence of his liability to pay, although

1840.

JONES

v.

LEWIS.

(a) 1 C. & M. 775.

1840.

JONES

v.

LEWIS.

he did not actually prove payment. For this purpose, the word "paid" might be rejected. On these grounds, the present rule ought to be discharged.

COLERIDGE, J.—I think that the plaintiff was bound to prove, under this declaration, that the sums in question were paid.

R. V. Richards and *Nichol* supported the rule. Whatever might be the general principle, in cases of this description, the decision in this case must depend upon the particular form of the declaration. If the damage was laid in one way the plaintiff could not prove it in another. Although it might not have been necessary to allege the damage otherwise than generally, yet as it had been alleged specially, in a particular manner, it was necessary that the plaintiff should so prove it. The plaintiff here alleged the actual payment of certain sums mentioned in the declaration. He was, therefore, bound to prove the payment, and evidence of a liability to pay those sums would not sustain the averment. The direction, therefore, of the undersheriff was wrong. The case of *Britchet v. Boevey*, already cited, was precisely in point. There, Mr. Baron *Bayley* said, "though upon a declaration properly framed, the plaintiff would have been entitled to recover these costs, yet there is this objection in the present case: this declaration does not allege that the plaintiff became liable to pay these costs, but that he was forced to pay a large sum of money. The evidence is, that an attorney was employed, but is he paid? No. The plaintiff, then, cannot say he was forced to pay, for it is only a debt he may hereafter be forced to pay, but liable to contingencies, as if he be discharged by the Bankrupt law; therefore, it is unreasonable that the plaintiff should recover what he may perhaps never pay." It was said, that the costs to which the plaintiff had become liable, were the necessary consequences of the verdicts found.

That was not so, for they were the mere probable consequence, as the judgment might be reversed. To the remote consequence of his negligence the defendant would not be liable. Even as special damage the plaintiff could not recover them, by analogy to actions of slander. In the case of *Craft v. Boite*, (a), it was laid down in the note "The special damage must be the legal and natural consequence of the words spoken, otherwise it does not sustain the declaration." The costs of moving for a new trial were clearly not a consequence sufficiently direct and necessary to be recoverable in this action. They were far too remote to be recovered under this declaration. The present rule, ought, consequently, to be made absolute.

1840.

JONES
v.
LEWIS.

Cur. adv. vult.

COLERIDGE, J.—This case stood over that I might examine the pleadings. It was a rule for setting aside the execution of a writ of inquiry, for the misdirection of the under-sheriff. The action was against an attorney for negligence in the conduct of three suits. The declaration in three counts, adapted to the three several suits, after stating the retainer and breach, alleged the damage thus, "And the said J. N. then recovered a verdict in the said action against the now plaintiff, for a large sum, to wit, 6*l.* 10*s.*, and the now plaintiff was afterwards, to wit, on, &c., forced to pay the same, and a large sum, to wit, 23*l.* 19*s.* 6*d.* for the costs of the said J. N., in prosecuting the said action; and thereby also, the now plaintiff, then paid and became subject to divers costs and expenses, to wit, 100*l.*, in attempting to defend the said action, and incidental thereto." At the trial, the verdicts, with the costs as taxed in the three actions, were given in evidence, amounting to 74*l.* 14*s.* 6*d.*, and it was also proved that three rules for new trials had been moved for and discharged with costs, the plaintiff's costs, in which,

(a) 1 Wms. Saund. 243 b.

1840.

JONES

v.

LEWIS.

were said to amount to 30%. No evidence was offered of the costs for which the plaintiff might be liable to the defendant for the conduct of the defences. It appeared that executions had issued in the three actions under which the sheriff had levied all the goods and chattels of the plaintiff which he could find, the proceeds of which were 26*l.*, and this was the total amount which the plaintiff had ever paid. The under-sheriff, in substance, told the jury that what the plaintiff had paid, was not the material question, but what he was liable to pay, and that they were at liberty to give the plaintiff the full amount of the verdicts and costs, with the costs of the three rules, if they believed that he had been made liable to that extent. The jury found a verdict for 80*l.* This direction cannot be sustained. With regard to the amounts of the verdicts and costs, the allegation in the declaration was unequivocally one of actual payment, and their amounts exceeded very much the sum actually levied. This alone would dispose of the rule, for that allegation is certainly a material one. Reliance was placed on the concluding part of the sentence, as couched in terms which let in the plaintiff to recover the costs of the rules; but when this is construed as it ought to be, with reference to the preceding clause, it is clear that it refers to costs which the plaintiff had paid, or was liable to, in conducting his own defence, not to any liability to the other party in the action. But no evidence was offered, nor could it well be, of any such payment or liability. This clause, therefore, does not help the plaintiff. Unless, therefore, the plaintiff will consent to reduce the verdict to 26*l.*, the amounts levied and paid, this rule must be made absolute.

Rule accordingly.

1840.

Ex parte **TEBBS**.

J. BAYLEY moved, on the part of the applicant, who was an articulated clerk, that he might be allowed to be examined, this Term, for the purpose of admission in the next. He had served all the period of five years pursuant to his articles, but the examiners had refused to examine him, on the ground that he had not attained the age of twenty-one years. He would become of age on the 16th of December. The affidavit, upon which the application was founded, stated, that the applicant had an offer of a valuable partnership, which, any delay in his admission might prevent him from obtaining. Under these circumstances, it was hoped that Mr. Tebbs might be allowed to go before the examiners for the purpose of examination, although he had not attained the age of twenty-one years.

Where an articulated clerk has served his whole period of five years, but has not attained the age of twenty-one years, if he will shortly attain that age, the Court will, under certain circumstances, allow him to be examined, though still an infant.

PATTESON, J.—If it would be a long time after the Term before he attained his age of twenty-one, I could not grant the rule; but as he will come of age so shortly after the Term, I think the application may be granted.

Application granted. (a)

(a) See the case of *Ex parte Clegg*, ante, vol. 6, p. 256, where Mr. Justice Patteson refused to allow an attorney's clerk to be examined, he not having attained

the age of twenty-one. There, however, it did not appear how soon the applicant would attain his age, nor that he had served the whole of his five years.

MILLS v. BROWN.

BODKIN shewed cause against a rule nisi, obtained by *Heaton*, calling on the defendant to shew cause, why the

A plea dated and delivered on the 23rd of October, is a

mere nullity, and, it seems, that the plaintiff may sign judgment as for want of a plea, but if he applies to the Court to set it aside, he must come within four days from the expiration of the time to plead.

1840.

MILLS

v.

BROWN.

plea, in this case, should not be set aside, and judgment signed. It appeared that the facts, as to which there was no dispute, were these:—The action was commenced in the month of July, and on the 8th of August a judge's order was obtained, by consent, for seven days' time to plead. The defendant delivered a plea on the evening of the 23rd of October, dated on that day. The question was, whether the plaintiff was in a situation to avail himself of the error committed by the defendant, in delivering a plea so dated at such a time? By the 1 & 2 Wm. 4, c. 39, s. 11, it was provided, "that no declaration, or pleading after declaration, shall be filed or delivered between the 10th day of August and 24th day of October." It had been ordered by 12 Reg. Gen., M. T., 3 Wm. 4, (a) "that in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose, after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th day of October." In the construction of that rule, the Courts, in the cases of *Wilson v. Bradstock* (b), and *Trinder v. Smedley* (c) had held that the fact of the time being enlarged did not interfere with the operation of the rule. The defendant was clearly wrong in thus delivering his plea, and the question was, whether it amounted to an irregularity or a nullity? If it was an irregularity, then the objection had been taken too late by the plaintiff; for the rule, in the present case, had not been obtained until the 3rd of November, which was the second day of Term, although the time for pleading had clearly expired on the 28th of October. The plaintiff should either have applied to a judge on the 31st of October, or, as the 1st of November was a Sunday, on the 2nd of November, which was the first day of Term. The case of *Hinton v. Stevens* (d),

(a) *Ante*, vol. 1, p. 474.(c) *Ante*, vol. 3, p. 87.(b) *Ante*, vol. 2, p. 416.(d) *Ante*, vol. 4, p. 283.

decided that an objection, on the ground of irregularity, must be taken within four days from the time of its commission. If, on the other hand, the error of the defendant rendered the plea a nullity, then the plaintiff should have treated the plea as a nullity, and signed judgment; not having done either, the present application could not succeed.

1840.

MILLS

v.

BROWN.

COLERIDGE, J.—The delivery of this plea was clearly no delivery at all.

Heaton, in support of the rule, contended, that this motion being founded upon the express provision of an act of Parliament, and the plea amounting to merely a nullity, the plaintiff could not waive the advantage of his objection. But, supposing that it was an irregularity only, the plaintiff must be considered as having come to the Court in due time. A party was only bound to come to the Court before the other side had taken another step. In this case the application had been made within that time. The restriction of four days could not be put upon a party in all cases. It might be said that no injury had been produced to the plaintiff by the course which the defendant had taken. The fact, however, was the contrary, because here the defendant had pleaded before he was obliged, according to the practice of the Court, which would have the effect of compelling the plaintiff to reply sooner. With respect to making this application to the Court, instead of treating the plea as a nullity, and signing judgment, the plaintiff had thought it more becoming practice to apply to the Court for leave to sign judgment than to take such a step of his own accord.

COLDRIDGE, J.—The party who makes such a motion as this is bound to take care that he is himself correct. The plea, in this case, delivered by the defendant, was a mere nullity; being a nullity it might have been safely

1840.

MILLS

v.

BROWN.

passed over by the plaintiff. Then, if it was a mere irregularity, according to the case of *Hinton v. Stevens*, the time within which the motion ought to have been made had expired on the 1st of November. The plaintiff ought, therefore, to have come to the Court on the 2nd of November, the 1st being a Sunday. He did not, however, apply till the 3rd of November, and I think, therefore, that his application was too late. The present rule must be made absolute, without costs on either side, and the defendant may have twenty-four hours to plead.

Rule accordingly.

PRIESTLEY v. GRAY and Wife.

Where the administrators of an attorney, send in their intestate's bill, and a judge's order is made to tax it, and more than one-sixth is taken off by the Master, the administrators are not bound to pay the costs of taxation, although they consented to the judge's order being made.

ERLE and *White* shewed cause against a rule nisi, obtained by *Humfrey*, which called upon the administrators of the attorney for the defendants in this case, to shew cause why they should not pay the costs of taxation of the attorney's bill, it having been reduced by more than one-sixth. It appeared, from the affidavits, that the administrators of the attorney had delivered the bill in the usual way. An application was then made for a judge's order, to which the administrators consented, for referring the bill to taxation. This order contained the usual undertaking, as to paying or refunding, according as it should be found that the attorney had not been paid or overpaid. On taxation the Master reduced the amount of the bill by more than one-sixth, and the present rule, among other matters, required the administrators to pay the costs of taxation. It was submitted, however, that all the authorities were against an application to make an attorney's personal representative pay the costs of taxation, even though the bill was reduced by one-sixth of its amount. The cases

of *Doe d. Sabin v. Sabin* (a), *Gerrard v. Arnold* (b), *Weston v. Pool* (c), and *Tidd's Practice*, p. 332, 9th Ed., were authorities to this effect.

1840.
 PRIESTLEY
 v.
 GRAY
 and Wife.

R. Alexander and *Humfrey* supported the rule, and contended, that the representatives of the attorney having entered into the undertaking to refund what should be found to have been overpaid, they had undertaken to abide by all the consequences of the taxation. They were, therefore, bound to pay the costs of that taxation pursuant to the provisions of the statute under which the taxation proceeded.

Cur. adv. vult.

PATTESON, J.—With respect to the liability of the attorney's administrators to the costs of taxation, the Master having taxed off more than one-sixth from the bill, they having consented to submit their claim to taxation, several cases have already decided, that personal representatives of an attorney are not liable to pay the costs of taxation. I think, therefore, that I must discharge this rule, with respect to that point, as well as the other matters mentioned in it, but without costs.

Rule discharged accordingly.

(a) *Ante*, vol. 8, p. 468.

(c) 2 *Strange*, 1056.

(b) *Ante*, vol. 6, p. 336.

SMITH v. JENNINGS.

MARTIN shewed cause against a rule nisi, obtained by *Peacock*, to set aside the issue, and all subsequent proceedings, for irregularity, with costs. It was an action of covenant on an annuity deed, brought to recover the sum

Where a defendant pleads an indenture, and the plaintiff craves oyer, and then, without setting forth the inden-

ture on the record, replies non est factum, and adds the similiter for the defendant, and delivers the issue with notice of trial, the defendant may return the issue, and pray that the deed may be enrolled, and if plaintiff afterwards proceeds to trial upon the issue as originally delivered, it is irregular, and the Court will set aside the verdict.

1840.
SMITH
v.
JENNINGS.

of 810 $\frac{1}{2}$., alleged to be due upon the annuity. The defendant pleaded a deed by the plaintiff, by which it was alleged, that he covenanted not to sue the defendant for the annuity. The plaintiff demanded oyer on the 3rd of August, and on the 5th of that month oyer was given. The plaintiff replied non est factum, and added the similiter for the defendant. On the 6th of August he made up the issue, and delivered it, with notice of trial, endorsed. The defendant afterwards, on the 8th of August, returned the issue, with the similiter struck out, and delivered a rejoinder in the following terms:—"The defendant, as to the replication of the plaintiff, says, that after the pleading of the said plea of the defendant, and before the plaintiff replied thereto as aforesaid, the plaintiff craved oyer of the said agreement in the said plea mentioned, and it was granted by the Court here, and the said agreement was thereupon read to him; wherefore, and because the plaintiff has not set out the said agreement on the oyer aforesaid, he, the defendant, prays that the said agreement may be enrolled, and it is enrolled in these words, that is to say, an agreement, &c. (the whole was then set out), which agreement, being so enrolled, the defendant, for rejoinder to the said replication, which the plaintiff has prayed, may be inquired of by the country does the like." No fresh notice of trial was given, and the plaintiff tried the cause as undefended. The objection to the plaintiff's proceedings was, that the defendant having rejoined in the manner described, a corresponding alteration ought to have been made in the issue, and that, consequently, a fresh notice of trial ought to have been given. *Martin* contended, first, that the defendant was not entitled to set out the deed at all; and, secondly, that if it was set out, the notice of trial given was sufficient. With respect to the first point, as the replication concluded to the country, the plaintiff had a right to add the similiter for the defendant, and give notice of trial. The plaintiff having done so, the defendant had no right to strike out the similiter and set forth the deed, which the

1840.

SMITH

v.

JENNINGS.

plaintiff denied to be his. If the replication had been in confession and avoidance, then, under certain circumstances, the defendant might have a right to set it out; but when the replication denied that any such deed ever existed, what were the contents of the deed was immaterial. No principle or authority could be shewn for encumbering the record with a deed under such circumstances. A party had a right to demand oyer, and having had it, might proceed without taking notice of the oyer, and plead to the deed. But if a party confessed the execution of the deed, but relied on any portion of it which would vary the rights of the parties, he could not proceed without setting out the deed. The case of *Smith v. Yeomans* (a) would be relied on by the other side. There, it appeared to have been held that an indenture set forth upon oyer became part of the preceding plea. The facts of that case, however, were quite different from those of the present, and, therefore, that decision did not apply. *Chitty's Archbold*, p. 1022, was also to be cited. Then, the rule (1 Reg. Gen., H. T., 2 Wm. 4, s. 44) (b), was cited. The words of that rule were,—“If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer-book, may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer.” That rule clearly applied only to the case of a plaintiff, and not to that of a defendant. Here, it was the defendant who sought to insert the deed, and not the plaintiff. It was then stated in the text-book cited, that “if the plaintiff, craving oyer of a deed, &c., do not afterwards set it forth in his replication, &c., the defendant, in his rejoinder, may (if he wish to have it set forth) pray that the deed may be enrolled, and then set it forth, or at least such parts of it as relate to the matters in dispute.” *Com. Dig.* tit. “*Pleader*,” (P 1), was cited as an authority for that proposition. No such position was to be

(a) 1 Saund. 317.

(b) *Ante*, vol. 1, p. 188.

1840.

SMITH
v.
JENNINGS.

found in *Comyn's Digest*. The course pursued in the present case would be found to accord with the rule laid down in the case of *The Weavers' Company v. Forrest* (a). There, it was held, that a defendant who has oyer is not bound to insert it in his plea. That was an action brought by the Company, as common informers, for the penalties under the 7 Geo. 2, c. 7, for selling printed calico, and set out their charter, to shew they had power to sue and be sued, with a profert. The defendants demanded oyer, and had a copy of the charter delivered to them, after which they put in the general issue of nil debet, taking no notice of the oyer. The plaintiffs made up the issue, and inserted the prayer and oyer at the head of the pleas, and demanded to be paid for it; upon which the Court was moved to expunge it; for though the defendants had a right to see whether the plaintiffs may sue, yet they are not bound to insert the oyer, but may plead to the merits. The Court there held, that if the plaintiffs would avail themselves of the letters patent being set out at large, they ought to do it by praying them to be enrolled at the head of their replication, and ought not to do it at the defendant's expense, and, therefore, ordered the oyer to be expunged. The report of this case in *Barnes*, p. 327, was, however, to a different effect, but was inconsistent. The case of *Snell v. Snell* (b) was a direct authority in favour of the plaintiff. The marginal note of that case was "where, in covenant, a defendant craves oyer of the deed, sets it out, and pleads non est factum, the deed so set out becomes a part of the declaration, and the only question at the trial of that issue is, whether the deed set out was executed by the defendant?" There, Mr. Justice *Bayley* said, "if a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer; and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead non est factum, without set-

(a) 2 Str. 1240.

(b) 4 B. & C. 741; 7 Dowl. & Ry. 249.

1840.

SMITH
v.
JENNINGS.

ting out the deed. If it does not support the breach he should set it out and demur. If, however, he sets out the deed on oyer, and pleads non est factum, the only question at the trial of that issue is, whether the deed, whereof the tenor is set out, was executed by the defendant or not? That is the language of *Gibbs*, C. J., in *Waugh v. Bussell*. "If, after a deed has been set out on oyer, a plea of non est factum could put in issue the legal effect ascribed to the deed in the declaration, and not merely the existence of the deed set out on oyer, it would be sending to the jury not so properly a question of fact as question of law; what is the construction or legal effect of the deed?" It appeared, therefore, from this judgment, that if any other course had been pursued by the plaintiff, he would, by pleading non est factum, have prevented himself from taking advantage of the variance which might appear between the deed, as it appeared in the declaration, and on oyer. No benefit could accrue to the defendant from setting out this deed, or enrolling it. The course adopted by the plaintiff, therefore, was clearly correct. Secondly, as to the notice of trial. Supposing the defendant had a right to set out the deed after enrolment, the effect of the pleadings would remain precisely the same as before. The issue on them, by means of the plea of non est factum, remained the same. The plaintiff, then, had a right to give notice of trial upon that issue. Having given such notice, and tried his cause pursuant to it, his proceedings were regular. On these grounds the present rule ought to be discharged.

Peacock, in support of the rule. The question is, whether, if a defendant plead a deed, and the plaintiff, after craving oyer, deny the making it, the defendant is or not entitled to have the deed put out on the record? On principle, he clearly ought. It was quite clear, from the case of *The Wearers' Company v. Forrest and others*, already cited, that if a plaintiff made profert of a deed in his pleadings, and the defendant prayed oyer of the deed, and did not set

1840.
SMITH
v.
JENNINGS.

it out, the plaintiff might pray to have the deed enrolled. When the pleadings were formerly ore tenus, the party pleading a deed was obliged to bring it into Court, and the opposite party had a right, if he desired it, to see the deed. If the opposite party, however, pleaded non est factum, without oyer, the effect of the plea was to deny that he ever made such a deed as that set out in the pleadings. If he craved oyer, and, after seeing the deed, denied it to be his, he merely denied that the deed produced to him was his, and he could not afterwards take any objection on the ground of variance between the deed, as alleged in the pleadings, and the deed when produced on the trial. There were several reasons why a party might wish to have the deed set out on oyer; it might be for the purpose of taking the opinion of the Court in which the action was brought, or of a Court of error, as upon the construction of the deed; as, for instance, when the question was, whether any particular instrument, under seal, amounted to a lease, or merely an agreement, a party might wish to have the deed set out upon the record, that the Court might judge whether it operated as an actual lease or not, or it might be for the purpose of preventing the opposite party from taking advantage of any variance in setting out the deed.

PATTESON, J.—By the plea of non est factum, the only issue raised is, whether the deed set out on oyer was executed? In *Snell v. Snell*, it appears to have been decided, that if the defendant wishes to take advantage of any variance between the deed alleged in the declaration and the one of which oyer is given, he must not set out the deed on oyer.

Peacock. It would be inconsistent that the party, after craving oyer and pleading non est factum, should be allowed to alter the effect of his plea, by not setting out the deed. The present case was the converse of the case in *Strange's Reports*. It appeared, from that case, that the

plaintiff would, under similar circumstances, have a right to make the deed a part of the record, and it was difficult to perceive why a defendant should not have a similar right. If, when the defendant cravedoyer of a deed, the plaintiff would have a right to set it out in his replication, and treat it as part of the defendant's plea, if the defendant did not set it out in his plea; the defendant must have a right, when the plaintiff cravedoyer of a deed set out in the plea, to have the deed entered of record, or set it out in his rejoinder, if the plaintiff did not set it out uponoyer in his replication. The deed not being set out upon the record, the issue was very different from that which would have been raised, if the deed had been set out uponoyer, or entered of record. The defendant had a right, therefore, to strike out the similiter, and the plaintiff having proceeded to trial upon the issue, as at first delivered, the subsequent proceedings were irregular.

1840. .
 SMITH
 v.
 JENNINGS.

Cur. adv. vult.

PATTERSON, J.—This is an action on an annuity deed. The defendant pleads an indenture, with a covenant not to sue. The plaintiff hasoyer, and replies non est factum, without setting out the indenture, adds the similiter, and delivers the issue, with notice of trial. The defendant returns it, and afterwards delivers a rejoinder, in which he prays that the indenture may be enrolled, and it is enrolled in hæc verba, and then adds the similiter. The plaintiff delivered no fresh issue or notice of trial, and the cause was tried as undefended, upon the original issue. *The Weavers' Company v. Forrest* is cited, in which the Court held, that if a defendant hasoyer of a deed, of which profert is made in the declaration, and then pleads non est factum, without setting out the deed, the plaintiff cannot set it out for him at the head of the plea, but must pray that it be enrolled, and set it out in the replication. A rule of Court of H. T.,

1840.
 SMITH
 v.
 JENNINGS.

2 Wm. 4, s. 44 (a), has expressly provided that the plaintiff may set it out at the head of the plea. It follows that non est factum must be a denial of the deed set out on oyer, and not of that stated in the declaration, and that a defendant cannot now, under a plea of non est factum, take advantage of a variance between the deed stated in the declaration and that set out on oyer. His course is to set it out himself and demur for the variance which makes the declaration inconsistent, for, when set out in the plea, the deed becomes part of the declaration. The law laid down by Mr. Justice *Bayley*, in *Snell v. Snell* (b), is, therefore, altered by the late rule, if it ever was as there stated. With all possible deference for so high an authority, I much doubt whether it even was as there stated. Oyer is the act of the Court, and having been once given, it ought, in strictness, to be stated by the person who has had it, and I cannot understand how he can give himself any advantage by omitting to state it. But whether this be so or not, and whether the rule of H. T., 2 Wm. 4, would apply to a case like the present, in which the plaintiff, and not the defendant, craves oyer, so that the words of the rule are not applicable; still I have no doubt that the party who gives the oyer, has a right to have the deed set out on the pleadings in some part of the record. Here, the defendant could not set it out otherwise than as he has done, by rejoining, and inserting it by way of enrolment in that rejoinder. For he does not make up the issue on the record, and I think it quite clear that the plaintiff was bound to alter the issue accordingly. As he has not done so, I think the trial was irregular, and it is unnecessary to consider whether, if he had altered it, a new notice of trial should have been given.

Rule absolute, without costs.

(a) *Ante*, vol. 1, p. 188.

(b) 4 B. & C. 749.

1840.

REGINA v. The JUSTICES of MIDDLESEX.

BODKIN shewed cause against a rule nisi, obtained by *Prendergast*, calling on the justices of the county of Middlesex to shew cause, why a writ of mandamus should not issue, commanding them to enter continuances and hear an appeal against an order for the removal of certain paupers from the parish of Hingham, in the county of Norfolk, to the parish of St. Leonard, Shoreditch, in the county of Middlesex. The facts of the case appeared to be these: The order of removal was made on the 21st of June, 1838, and sent, with a copy of the pauper's examination, to the appellant parish on that day or the day following. On the 27th of June, a notice was received by the respondent parish, which was within the twenty-one days prescribed by the 4 & 5 Wm. 4, c. 76, sec. 79. That notice was in the following form:—"We, the overseers of the parish of Hingham, give notice that we shall appeal, &c., and that the grounds of our appeal are, &c." The notice then proceeded to state the grounds of the appeal, but did not mention the sessions at which the appeal was to be. It was signed by two persons, who described themselves as overseers of the poor of the parish of Hingham. At the same time, a certificate of marriage, which shewed the pauper to be settled in another parish, was forwarded. No further steps were taken by the appellant parish. In the beginning of the month of April, 1839, the pauper was removed. A fresh notice of appeal was then given for the next sessions, which took place in July. The quarter sessions refused to hear the appeal, on the ground, that notice had not been given in due time. The question in this case, therefore, was, whether, according to the construction which ought to be put on the 79th section of the 4 & 5 Wm. 4, c. 76, the notice of appeal had been given too late? In order to raise the question, it had been admitted between the parties,

Where a parish gives notice of appeal under the 4 & 5 Wm. 4, c. 76, s. 79, against an order of removal, within twenty-one days after service of the order of removal, but does not prosecute the appeal at the next practicable sessions, and the respondent parish does not remove the pauper for a considerable time afterwards, the appellants may give fresh notice of appeal, pursuant to 13 & 14 Car. 2, c. 12, s. 2, when the pauper is actually removed.

1840.
REGINA
v.
The Justices of
MIDDLESEX.

that the Middlesex Sessions should, for this purpose, be considered like any country Quarter Sessions. This was necessary, because, by the practice of the Middlesex sessions, eight opportunities were afforded for the trial of appeals, although only four opportunities existed at the country quarter sessions. It was agreed, therefore, that the October sessions in the year 1838 was the first practicable sessions, to which, under any circumstances, the appeal could have been made. The words of sec. 79 were the following: "That from and after the 1st day of November, 1834, no poor person shall be removed or removable under any order of removal from any parish or workhouse by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed: Provided always, that if such overseers or guardians as last aforesaid, or any three or more of such guardians, shall by writing under their hands agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed: Provided also, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or in case such appeal shall be duly prosecuted, until after the final determination of such appeal." On this section, the question arose, whether a parish, which had given notice of appeal pursuant to the provisions of the 4 & 5 Wm. 4, c. 76,

could abandon that notice and give a fresh notice, pursuant to the 13 & 14 Car. 2, c. 12, s. 2? It was, however, to be contended, as a preliminary matter, that the appellants had not in fact appealed, for, the notice sent to the responding parish did not amount to a notice of appeal. If the language, however, of it was considered, it could not be regarded as amounting to any thing else than a notice of appeal. Treating it then as a notice of appeal, it was submitted, that the appellants could not first of all avail themselves of the new statute, by appealing before the actual removal of the pauper, and afterwards, when the removal did take place give a fresh notice of appeal, according to the old statute of the 13 & 14 of Car. 2, c. 12, s. 2. If the Court should decide that the appellant parish was at liberty to proceed in this manner, then an appellant parish might avail itself of the new statute, for the purpose of preventing the removal of the pauper; and then, no matter at how distant a period, give another notice of appeal, and thus, at an inconvenient time, raise the question as to the place of the pauper's settlement. The Courts had in several cases decided, that a parish, which was served with an order of removal, was not compelled to avail itself of the provisions contained in the 4 & 5 Wm. 4. In this case, however, the appellant parish had availed itself of those provisions, and, therefore, had no right to abstain from prosecuting its appeal pursuant to that act. It could not wait until the pauper was actually removed, before it litigated the question as to his settlement.

Kelly and *Prendergast* supported the rule, and contended, first, that under the circumstances that were disclosed in the affidavits, the notice in question could only be regarded as a compliance with the request which the respondents had made, to be informed by the appellants whether any grounds of objection existed on their part to the order of removal. If the notice was examined it must appear, that

1840.
 REGINA
 v.
 The Justices of
 MIDDLESEX.

1840.
 REGINA
 v.
 The Justices of
 MIDDLESEX.

it did not amount to a notice of appeal. It did not state any sessions to which an appeal was to be made, nor was it served regularly, but merely transmitted by post. But supposing it did amount to a notice of appeal, the course pursued by the appellants was perfectly justifiable. The cases of *Regina v. The Justices of Salop* (a), *Rex v. The Justices of Cornwall* (b), *Rex v. The Justices of Leicester* (c), and *Rex v. The Justices of Suffolk* (d), decided, that a parish was not bound to appeal within twenty-one days after the service of the order of removal. [*Patteson, J.*—The cases in question only decide, that according to the statute a party has a right to appeal before the removal, but he need not exercise that right. He may wait till the actual removal takes place.] But supposing the appellant to have exercised the right, pursuant to section 79, there was nothing in the statute to take away the right to appeal, under the old statute of Car. 2, if the matter of the appeal had not been brought before the Quarter Sessions. No doubt, if there had been a trial at the sessions, the matter could not be tried again; but by giving the notice of appeal, on which no steps were taken, the party had not deprived himself of his right to have the merits considered. No provision to that effect was contained in the statute, and no decision had been pronounced that such a construction could be put upon it.

PATTESON, J.—When the notice of appeal is given, the opposite party is bound to abstain from removing the pauper, until the time for prosecuting the appeal has expired. Could it have been intended by the Legislature that the support and custody of the pauper should be imposed upon the respondent parish during the twenty-one

(a) *Ante*, vol. 6, p. 28.

(b) 6 Ad. & El. 894.

(c) *Ante*. vol. 4, p. 633.

(d) 4 Ad. & El. 319; and 5 N. & M. 503.

days, and until the time for prosecuting the appeal was entirely passed, and then that the matter should be tried over again?

1840.
REGINA
v.
The Justices of
MIDDLESEX.

Kelly. That would be merely a matter of inconvenience, which could not supply a provision in the act of Parliament, the effect of which would be to deprive the party of his right to have the matter tried on the merits. Although the enforcement of this right might be productive of inconvenience, it would not amount to injustice, because, by the provisions of sec. 84, if the appellant parish should ultimately be found to be the parish in which the pauper was legally settled, that parish would be compelled to pay the expenses of relief and maintenance of the pauper from the time of serving notice that the pauper was chargeable. The case of *Rex v. The West Riding of Yorkshire* (a) was strictly analogous. The marginal note of that case was, "By the 17 Geo. 3, c. 106, a power of appeal is given, on certain conditions, from a conviction by a justice of the peace to any Quarter Sessions, to be holden within six months from such conviction. If the appellant lodge his appeal, and the Court dismiss it without entering into the merits, because the previous conditions have not been regularly complied with, and confirmed the conviction, such judgment is conclusive, and the party cannot lodge a second appeal from the same conviction, though within the six months." In that case Mr. J. Buller said, "The act says, 'that if any person shall think himself aggrieved, &c. he may appeal to the justices at any general Quarter Sessions, &c. within six months.' That certainly only gives a right of appealing once; and the parties here, having had one appeal, are bound by that. If the question had rested solely on the notice of appeal for the first sessions which happened, and nothing further had been done, I should not have thought the parties bound by it; for the act gives the power of ap-

(a) 3 T. R. 776.

1840.
 REGINA
 v
 The Justices of
 MIDDLESEX.

pealing within a certain time with these two requisites, that the appellant must give ten days' notice, &c. and within four days after enter into a recognizance to try his appeal. When the party, therefore, found out his mistake, he might have stopped there; but he persisted in going on with his appeal, and brought it before the Court, and took their judgment upon it. The appellate jurisdiction was, therefore, fully exercised; and though it was originally in the option of the parties whether they would appeal to the first or second sessions which took place within the six months, yet having made their election to appeal to the first, they must abide by the judgment there given." The remarks of Mr. J. *Buller* were strictly applicable to the present case. The notice of appeal having been given in this case, and nothing done upon it by the appellant, it must be considered as abandoned by him, and then he was remitted to his rights as they existed previous to the passing of the 4 & 5 Wm. 4, c. 76. According to the law, as it then stood, the appellant parish was entitled to wait until the pauper was actually removed, and then appeal to the next practicable sessions after the removal had taken place. In the present instance it was quite clear, that the first practicable sessions, after the actual removal of the pauper, was the sessions to which the appeal had been made.

PATTESON, J.--I wish this case had been brought before the full Court. It is a very important question, whether, after a notice has been given, pursuant to the statute of 4 & 5 Wm. 4, c. 76, that notice not being followed up by a trial of the appeal, and the pauper is afterwards actually removed, the appellant may still give notice of appeal. That question I shall not decide at once. I can readily dispose of the rest of the case. It has been said that this notice sent by the appellant does not amount to a notice of appeal; and a person has sworn that he did not mean this as a notice. In doing this he has sworn very boldly indeed. I think there can be no possible doubt that this was a notice

of appeal. Considering it, therefore, as a notice of appeal, the question arises, whether the appellant, having given notice of appeal, and let the time elapse at which that notice ought to be followed up by the trial of the appeal, the appellant is at liberty to give a fresh notice of appeal, under the statute of Car. 2. None of the cases decided have touched that point. They have only established this principle, that although by the act of Parliament the appellant parish has a right to appeal before the pauper is removed, yet the appellant parish is not bound to give such a notice, but is entitled to wait until the pauper is actually removed. It does not follow that because a parish begins to act according to the new remedy, which it abandons, that it has not a right to resort to the old one. That is a question of much consequence, and fit to be considered.

1840.
 REGINA
 v.
 The Justices of
 MIDDLESEX.

Cur. ado. vult.

PATTERSON, J.—This was a rule for a writ of mandamus to the Court of Quarter Sessions, to enter continuances and hear an appeal, and the question is, whether the appellant parish, having given notice of appeal within twenty-one days after it received the order of removal, under the 79th section of 4 & 5 Wm. 4, c. 76, and not having prosecuted such appeal, can, upon the subsequent removal of the pauper, appeal against the order under 13 & 14 Car. 2, c. 12, s. 2. On the argument, I expressed my decided opinion, that what took place here amounted to a notice of appeal by the appellant parish. On consideration I certainly adhere to that opinion, and I also think that the reasons adduced to shew that the question I have above stated does not arise are insufficient. The question itself is of some importance in regulating the practice. This Court has several times held, that the parish officers are not bound to avail themselves of the 79th section, but may suffer the twenty-one days to elapse, and appeal to the

1840.
 REGINA
 v.
 The Justices of
 MIDDLESEX.

next sessions after the actual removal. They have considered that the appellant parish may treat itself as a party aggrieved by the order of removal before actual removal, by the necessary operation of the enactments of 4 & 5 Wm. 4, c. 76, or may wait until they are aggrieved by the actual removal. Further than this, the decisions have not gone, the facts not having, prior to the present case, raised the question now to be determined. I have no doubt, that if the appellant parish had lodged and prosecuted an appeal, in pursuance of their notice, and had failed, whether on a point of form or on the merits, and the pauper had afterwards been removed, as the 79th section directs, the appellant parish could not have appealed again. The case of *Rex v. The Justices of the West Riding of Yorkshire* (a) is an express authority for the principle on which I should so hold, and, indeed, the learned counsel did not dispute that point. The dictum of Mr. Justice *Buller*, in that same case, is also an authority to shew that a notice of appeal not followed up will not preclude a party from giving a fresh notice, and appealing thereon, provided it is in proper time, supposing it to be the first notice. The principle of that dictum applies to the present case, and as the 84th section of 4 & 5 Wm. 4, c. 76, gives the expenses of maintenance to the respondent parish, if successful, from the time of their giving notice of the chargeability, no material injury arises to them from the delay. Looking, therefore, at all the enactments of 4 & 5 Wm. 4, c. 76, relating to this subject, and not finding anything which shews that the legislature intended a notice of appeal, not followed up and prosecuted, to deprive the appellant parish of its remedy upon the actual removal of the pauper, and finding no absurdity or inconsistency involved in holding that it did not so intend, I feel myself bound to hold that the appellant parish might expressly or tacitly abandon their first notice of

(a) 3 T. R. 776.

appeal, and take their remedy after the actual removal. I am, therefore, of opinion, that the appellant parish was not too late, and that this rule must be made absolute.

1840.

REGINA

v.
The Justices of
MIDDLESEX.

Rule absolute.

REGINA v. The JUSTICES of HAMPSHIRE.

PLATT and *White* shewed cause, against a rule nisi, which called on the justices of the county of Hants to shew cause, why a writ of certiorari should not issue, to remove into this Court a certain order made at the General Quarter Session of the Peace, holden in December last, upon the application of the Guardians of the Hartley Wintney Union, for an order upon Stephen Rowell, to reimburse the parish of Odiham, within the said Union, for the maintenance and support of a female bastard child, born on the body of Sarah Champion, single woman; and whereby it was ordered that the sum of 19*l.* 19*s.* 4*d.*, the costs of and charges incurred by the said Stephen Rowell, in resisting such application, should be paid by the said Guardians. The order was in the following terms:—"Southampton to wit:—At the General Quarter Sessions of the Peace of our Sovereign Lady the Queen, holden at the Castle of Winchester, in and for the said county of Southampton, on, &c. (31st December, 1839), before, &c. By the Court. Whereas a female bastard child was born on the 28th day of March last, in the parish of Odiham, within the Union of Hartley Wintney, in this county, of the body of Sarah Champion, single woman, which said bastard child, by reason of the inability of the said mother of such child to provide for its maintenance, has become chargeable to the said parish, and the Guardians of the said Union having made diligent inquiry as to the father of such child, and due notice having been given to Stephen Rowell, of the said parish, sawyer, of the appli-

An order of Quarter Sessions made under the 4 & 5 Wm. 4, c. 76, s. 73, and the 2 & 3 Vict. c. 85, ss. 1, 3, requiring the overseers to pay the costs of the putative father of a bastard, against whom an application has been made, must state an application to the justices at petty sessions, the recognizance to appear at Quarter Sessions, and the transmission of that recognizance to the Quarter Sessions.

If it does not state those matters, the defect cannot be supplied by affidavit.

It is not an objection to the order, that it does not state the mother to have been settled in the parish applying, or chargeable thereto, or that the consent of the guardians

to the application was obtained.

1840.
REGINA
v.
The Justices of
HAMPSHIRE.

cation hereunder mentioned intended to be made, the said guardians have applied to this Court for an order on the said Stephen Rowell, the person whom they charge with being the putative father of such child, to reimburse the said parish for its maintenance and support: and the said guardians not having produced any agreement of the said Stephen Rowell, and the said Stephen Rowell having appeared at this Court by his attorney, at the time when such application came on to be heard, this Court hath proceeded to hear, and hath heard evidence thereon, and not being satisfied that the evidence adduced sufficiently supported the charge made against the said Stephen Rowell, do not think fit to make any order on the said Stephen Rowell, but do order and direct that the sum of 19*l.* 19*s.* 4*d.*, being the full costs and charges incurred by the said Stephen Rowell, in resisting such application, shall be paid by the said guardians." The ground on which this application was made was, that it did not appear on the face of the order that the justices had jurisdiction to make it. That would depend on the language of the 4 & 5 Wm. 4, c. 76, ss. 72, 73, and 2 & 3 Wm. 4, c. 84, ss. 1, 3. By the former statute it was provided that the Quarter Sessions should have power, on applications by parish officers, to charge the putative fathers of bastard children with their support for a certain period; and in case the Quarter Sessions should not make such an order, that it should be lawful to give the putative father the costs of resisting the application. By the latter statute it was provided, that after it was passed, "it shall not be lawful to make any such application to any Court of General Quarter Sessions, nor shall any Court of General Quarter Sessions have any authority to make any order upon any such application." By that section the power to make orders on the putative fathers of bastard children was transferred to the "special or petty session, in and for the division or borough within which such union or parish, or any part thereof, shall be situated." By section 3, it was provided, "That if the person whom the guardians or overseers shall charge with being the putative

1840.

REGINA

v.

The Justices of
HAMPSHIRE.

father of such child, shall declare to the justices in such special or petty session, that he is desirous that the charge shall be heard and determined at the Quarter Sessions of the peace, and shall then and there enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the Quarter Sessions then next or next but one ensuing, as the justices shall think fit, to answer to the said charge, and to abide the judgment of the Court at such sessions, and to pay all the costs incurred by the said guardians and overseers in bringing such charge before the said Court, in case the Court shall adjudge him to be the putative father of such child, then the justices in special or petty session shall not proceed further to hear the charge, but shall take such recognizance, and transmit it to the clerk of the peace; and in such case all further proceedings in the matter of such charge shall be had before the said Court of Quarter Sessions as if this act had not been made." The principal objection was, that the order did not state that an application had been made to the petty sessions, or that a recognizance had been entered into, or that that recognizance had been transmitted to the Quarter Sessions. Although those matters did not appear on the face of the order, the affidavits, in answer to the application, stated that all those steps had been taken.

PATTESON, J.—I cannot hear those affidavits, as the rule is quite clear that I must, in deciding this question, as to what ought to appear on the order, only look to what appears on the face of the order itself.

Platt and *White* then contended that the order was sufficient as it stood, to shew that the justices had jurisdiction to make it. If the two sections, the first and second of the 2 & 3 Vict. c. 85, were read together, it would appear that the Quarter Sessions had clearly power to make this order, although certain things were required to be done previous to that jurisdiction being exercised. As the jurisdiction

1840.
 REGINA
 v.
 The Justices of
 HAMPSHIRE.

did exist, it would be presumed that it had been properly exercised, and if so, the acts in question must have been done. There was no authority to shew that it was necessary for the justices to set forth all those steps prescribed by the statute as having been taken. Other objections had been taken to the order, but those would have been more properly urged by the putative father, in case an order had been made upon him by the sessions. The result of them was, that the order did not shew this to be a proper case for the interference of the justices to make an order on the putative father. That objection could not be taken by the guardians, as they applied to the sessions for the purpose of obtaining the order.

Rawlinson, in support of the rule, submitted that it was not competent for the other side to introduce affidavits, in order to supply defects in the order of sessions. He cited *Regina v. The Leeds and Manchester Railway Company* (a). Since the passing of 2 & 3 Vict. c. 85, s. 1, the jurisdiction of the Quarter Sessions to make orders of this description was abolished generally. By the third section, certain exceptions were introduced which gave the quarter sessions jurisdiction. Unless the facts which constituted those exceptions occurred, the sessions had no jurisdiction. It was necessary, therefore, in order to avoid the effect of the general provision contained in sec. 1, that those facts should be shewn on the face of the order. Where the question of jurisdiction arose, there was no intendment in favour of it. It was necessary that the jurisdiction should clearly appear on the face of the order. He cited *Regina v. Toke* (b), *Rex v. Davis* (c), *Rex v. The Inhabitants of Hulcott* (d), *Rex v. Stone* (e), *Regina v. Read* (f). If this order had been made previous to the passing of 2 & 3 Vict.

(a) 3 N. & P. 439; 8 Ad. & El. 413.

(b) 3 N. & P. 323; 8 Ad. & El. 227.

(c) 2 N. & M. 349; 5 B. & Ad.

(d) 6 T. R. 583.

(e) 1 East, 639.

(f) 1 P. & D. 413; 9 Ad. & El. 619.

c. 85, it would have been in the same form. The passing of that statute had introduced substantial changes in the jurisdiction of the sessions, and those must clearly shew that a difference ought to be made in the statements contained in the order. The order was objectionable in other respects, as it did not shew that the mother of the child had a settlement in the parish of Odiham, or that she was chargeable to that parish, or that the consent of the guardians to make the application had been obtained.

1840.
 REGINA
 v.
 The Justices of
 HAMPSHIRE.

PATTESON, J.—If this had been an order on the putative father, those objections might have been available. If it had appeared that the mother was not settled in the parish, or that she was not chargeable, or that the consent of the guardians to make the application to the sessions had not been procured, that might be a ground for refusing to make the order upon the putative father; but those are matters which could be of no importance, since the order was refused. In order to support those objections, it must be contended, that if the order had stated the woman not to be settled in the parish making the application, and that the justices, on that ground, refused to make the order on the putative father, but directed the applicants to pay his costs, that that would have been a bad order. The case being brought before the Quarter Sessions, for whatever reason the justices refused to make an order on the putative father, it could not be said that they had no jurisdiction to order costs to be paid by the applicants to the party against whom they made the application. No doubt an application against the putative father must be originally made to the justices at petty sessions, and that the putative father, if he wishes to refer the matter to the Quarter Sessions, must enter into recognizances, which are to be transmitted to the Quarter Sessions. The question is, whether those steps must appear on the face of the order? On this point, I shall take time to consider my judgment.

Cur. adv. vult.

1840.
REGINA
v.
The Justices of
HAMPSHIRE.

PATTESON, J.—The question in this case arises under the statutes 4 & 5 Wm. 4, c. 76, ss. 72 and 73, and 2 & 3 Vict. c. 85, ss. 1 and 3. By the former act, the justices in the Court of Quarter Sessions have power to hear applications by parish officers, for charging the putative father of a bastard child, and to make an order on him; or in case they do not make such order, to give him the costs of resisting the application. By the latter act, the power of hearing such applications is given to justices in special or petty sessions, and it is enacted, that “after the passing of this act, it shall not be lawful to make any such application to any Court of general Quarter Sessions, nor shall any Court of general Quarter Sessions have any authority to make any order upon any such application.” The third section, however, provides, that if the person charged shall declare to the justices at petty sessions that he is desirous that the charge shall be heard and determined at the Quarter Sessions, and shall enter into recognizance as there directed, then the justices in petty sessions shall not proceed further, but shall take such recognizance, and transmit it to the clerk of the peace; “and in such case, all *further* proceedings in the matter of such charge shall be had before the said Court of Quarter Sessions, as if this act had not been made.” The effect of these enactments clearly is, to give authority to the Court of Quarter Sessions, only under certain circumstances and on certain conditions. The existence of those circumstances, and the performance of those conditions do not raise a mere question, whether a party has put himself in a situation to be heard at the Quarter Sessions, but a question as to the jurisdiction of the Quarter Sessions. In the present case, the circumstances existed, and the conditions were performed, as appears by affidavits. But it is contended that those affidavits cannot be received, and that the order of Quarter Sessions must, on the face of it, shew all that is necessary to give the Court jurisdiction. The order does not shew that; for, it merely states the application of the guardians to the Court of Quarter Sessions, the determination of the Court

not to make an order on the person charged, and an award of costs in his favour. It is in the same form as if the Quarter Sessions had general original jurisdiction under 4 & 5 Wm. 4, not a jurisdiction arising from the transmission of the recognizance, &c., under 2 & 3 Vict. Such being the state of facts, I am of opinion that the writ of certiorari prayed for by this motion must go. I cannot find any distinction laid down between orders by justices in Quarter Sessions, and out of Quarter Sessions. In either case, it is necessary that the order should shew, upon the face of it, that they have jurisdiction. Now, the statute of 2 & 3 Vict. expressly enacts, that they shall not have authority, unless the case be transmitted to them from the petty sessions. They should, therefore, have stated in their order that it was so transmitted.

1840.
REGINA
v.
The Justices of
HAMPSHIRE.

Rule absolute.

EDWARDS v. NAPIER.

WHITE moved to make absolute a rule nisi, for referring it to the Master, to compute principal and interest on a bill of exchange. The question was, whether the affidavit, on which the application was founded, disclosed a sufficient service on the defendant? The affidavit stated, that the defendant had left the copy of the rule, "with a female who was in the habit of receiving messages for the defendant, at the dwelling house of the defendant, in Brewer Street, Golden Square."

It is sufficient to serve a rule nisi to compute on "a female in the habit of receiving messages for the defendant at his dwelling-house."

PATTESON, J.—I think that is a sufficient service of the rule.

Rule absolute.

1840.

In order to support an application to stay proceedings from the Brighton Court of Requests Act, a writ of certiorari must issue, the rule for which is absolute in the first instance.

FRANKS v. WICKS.

TYNDALE applied for a rule to shew cause, why the proceedings in this case, on a judgment in the Brighton Court of Requests Act, (3 & 4 Vict. c. 10) should not be stayed. The plaintiff had lodged a plaint in that Court for the recovery of a sum of 10*l.*, and the judge, acting without the assistance of a jury, as he was empowered, dismissed the claim. Another plaint for the same debt was afterwards lodged by the plaintiff, and judgment was pronounced in his favour. The present application was made, pursuant to the provisions of sec. 46 of the statute, by which it was provided, "That no plaint entered in the said Court, nor any order, judgment, or proceeding therein shall be removed into any superior Court, by any writ or process whatsoever, except by leave of a judge of one of the superior Courts at Westminster, and then only in cases where the debt claimed shall exceed 5*l.*; and in all such cases it shall be lawful for any such judge, by an order in writing under his hand, to stay all proceedings in the said Court hereby created, upon such terms as to giving security for the costs incurred in the said Court hereby created, and for the costs which may be incurred in any action to be brought in the superior Court for the same matter, or otherwise, as such judge shall direct; which security may be taken by way of recognizance, or otherwise, as such judge shall think fit."

PATTESON, J.—The proper mode of proceeding will, I think, be for you to move for a rule for a certiorari, which will be absolute in the first instance, to remove the proceeding of the Court of Requests into this Court. When removed, then an application may be made to stay them.

Rule accordingly (*a*).

(*a*) See *Webster v. Mason*, ante, vol. 8, p. 705.

1840.

KNOW *v.* DUNCAN.

M*MARTIN* applied for a rule to shew cause, why a certain sum of money, which the defendant had paid into Court in lieu of bail, pursuant to 43 Geo. 3, c. 46, and the 7 & 8 Geo. 4, c. 71, should not be paid out to the plaintiff. The defendant had been arrested under a judge's order, on the 1 & 2 Vict. c. 110, s. 3, it being sworn that the defendant was about to leave the country, and proceed to India. Inquiries were afterwards made at the India House, and it was then ascertained that he had actually sailed for India. The difficulty was as to where the rule nisi should be served. In the case of *Peate v. Triscott* (a), the Court allowed a copy of the rule in a similar case to be left at the defendant's last place of abode, and to be stuck up in the office. It was submitted that the rule might be stuck up in the office merely.

If a defendant has deposited money in lieu of bail, and he afterwards leaves the country, the Court will allow a rule nisi for taking the money out of Court to be served by sticking it up in the office.

PATTESON, J.—That I think would be sufficient service under the circumstances of this case.

Rule accordingly (b).

(a) 1 Chit. R. 675.

(b) See *Weller v. Robinson*, 1 Taunt. 433.

VAUGHTON *v.* BRINE and Others.

H*UMFREY* applied for a rule to shew cause, why an attachment should not issue against the attorney of the defendants, for not obeying a writ of subpoena duces tecum, which required the attorney to attend as a witness, on behalf of the plaintiff at the trial of this cause. Some difficulty arose upon the form of the subpoena. It required the at-

A writ of subpoena duces tecum required a defendant's attorney to appear on a particular day, but did not command him to appear "from day to day,"

after that day. The cause was postponed at the instance of the defendant, and the attorney did not appear on the day when the cause was called on. The Court refused an attachment for disobedience to the subpoena.

1840.
 VAUGHTON
 v.
 BRINE
 and Others.

torney to attend on the 6th of June, but did not contain the usual clause, commanding him to attend "from day to day" after that day. When the cause was reached in the list on the 6th, an application was made by the counsel for the defendant to defer it until the 18th. On the 18th, when the cause was called on, it was ascertained in the usual way, that the attorney was not in attendance. The plaintiff was consequently forced to withdraw his record. The question was, whether the omission already mentioned in the writ of subpoena prevented the non-attendance of the attorney from amounting to a contempt? It appeared, by the affidavits, that he had not attended on the 6th. He must, being an attorney, have been aware of the application made by his counsel for postponing the trial. Being so aware, he must have known that it was his duty to attend on the 18th. Not having done so he had committed a contempt.

PATTESON, J.—I think the plaintiff's remedy by attachment is lost by the omission of the usual words in the subpoena, and I am not disposed to assist a party who neglects his duty. I cannot say that a person is in contempt for not doing what he was not required to do. As those words had not been inserted in the subpoena, I think the plaintiff is not entitled to an attachment, for, I cannot bring a party into contempt by construction.

Rule refused.

BUSH v. PRING.

If a defendant for the purpose of delay, obtains a rule for a special jury, the Court will permit him to have it tried by such a jury, but will compel him to try it in its order pursuant to the notice of trial, although on a day when the usual practice is not to take special juries.

TYRWHITT applied for a rule, calling on the defendant to shew cause, why the side bar rule, obtained by him in this case, should not be discharged. This application

permitted him to have it tried by such a jury, but will compel him to try it in its order pursuant to the notice of trial, although on a day when the usual practice is not to take special juries.

was made on the 17th of November, and notice of trial had been given for the third Sittings in this Term, and which were to take place on the 23rd. It was not usual to try special juries at those Sittings. The defendant had served his rule for a special jury on the 13th. The object of the defendant was sworn to be to obtain delay, as the issue raised on the pleadings was exceedingly simple, and could not require the intervention of a special jury. The plaintiff had no objection that the cause should be tried by a special jury, but he was desirous of avoiding the delay resulting from the course which the defendant had pursued.

1840.

BUSH

v.
PRING.

PATTESON, J.—The usual course now adopted is, to obtain a rule nisi, to shew cause, in two days, why the case should not be tried in its order, on the 23rd, although the rule of the special jury has been obtained. If the defendant can be prepared with a special jury on that day, he may have the cause tried by it. This mode is now adopted in practice, instead of moving to discharge the rule for a special jury.

Rule nisi accordingly.

Hoggins appeared, when the rule was due, to shew cause, but was not furnished with any affidavit in answer to the plaintiff's application.

PATTESON, J.—The defendant may have the cause tried by a special jury on the 23rd, but it must be taken in its order.

Rule absolute.

BARNES and Others v. WHITEMAN.

CLARKSON shewed cause against a rule nisi, obtained by *Tyndale*, calling on the defendant to shew cause, why
 nonsuited, he cannot afterwards move to set aside that nonsuit.

Where a
 plaintiff of his
 own accord,
 elects to be

1840.
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 BARNES
 and Others
 v.
 WHITEMAN.

the nonsuit, in this case, should not be set aside, and a new trial granted, on the ground of misdirection on the part of the under-sheriff, at the trial of the cause before him. The declaration contained only one count, which was on the account stated. It was proposed, on the part of the plaintiff, at the trial, to prove his case, by reading certain documents, which, it was contended, the defendant ought to produce. The under-sheriff was of opinion, that the defendant was not bound to produce them. The plaintiff then put in a letter for the purpose of supplying the defect in his case. The under-sheriff having read this letter, thought that it would only entitle the plaintiff to nominal damages, but expressed his willingness to allow the case to go to the jury upon the evidence. The plaintiff's counsel requested that the case might go to the jury, and the counsel for the defendant was upon the point of addressing the jury for his client, when the plaintiff's counsel elected to be nonsuited. The present releases obtained on the ground that the under-sheriff was wrong in the opinions which he had expressed with respect to the evidence. *Clarkson* submitted that as the plaintiff had elected to be nonsuited, it was not competent for him to move to set that nonsuit aside.

PATTESON, J.—I think that where a plaintiff has elected to be nonsuited, he cannot move afterwards to set it aside. It was afterwards arranged between the parties that a new trial should take place on certain terms.

Rule accordingly. (a)

(a) In the case of *Alexander v. Barker*, 2 C. & J. 133, it was held, that submitting to a nonsuit out of deference to the opinion of the judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside that nonsuit.

1840.

SAINSBURY v. THORP.

THOMAS moved that the writ of summons, issued in this case against the defendant, might be served upon the defendant, by leaving it at the house of his uncle. The affidavit, on which the application was founded, stated that the defendant had formerly held some situation in the Army Pay Office. Inquiries were made at that office as to where the defendant resided, the inquirer was then informed that his address was the house of his uncle. An inquiry was then made at the house of the uncle, and the answer was that the defendant did not reside there. Two several letters were then written, addressed to the defendant, and left at the uncle's house. Answers were subsequently returned to these. On this state of facts, it was proposed, that the writ of summons should be served at the house of the uncle.

Where a defendant's place of abode cannot be found, although letters left at his uncle's house for the defendant, are answered by him, the Court will not allow service of a writ of summons at the uncle's, to be good service.

PATTESON, J.—If the defendant cannot be served, and he is keeping out of the way to avoid service, a writ of *dis-tringas* should be obtained in the usual way. I cannot introduce a new practice for the purpose of this particular case. I do not think a service at the uncle's would be sufficient.

Rule refused.

WRIGHT v. LEWIS.

MONTAGUE SMITH shewed cause against a rule nisi, obtained by *Butt*, calling upon the plaintiff to shew

If a defendant, in replevin, obtains judgment of non

pros. for a return, and a certain amount for costs, the judgment is not final, until taxation; but would be final if it had been for a return only.

In such a case, the defendant, in order to obtain his costs, should assess them before a jury, as consequential on his damages.

If a writ of *pone per vadios*, if made returnable in Vacation, instead of Term, although by mistake, the Court will set it aside.

1840.

WRIGHT
v.
LEWIS.

cause, why a writ of procedendo should not issue, and why the writ of pone per vados should not be set aside. It appeared, from the affidavits, that a plaint in replevin was levied in the County Court of the sheriff of the county of the city of Exeter, on the 29th of May, 1838. The plaintiff declared on the 26th of June, and on the 24th of July the defendants avowed for 3*l*. 10*s*. rent in arrear. The plaintiff pleaded on the 21st of August *riens* in arrear. To this plea, the plaintiff demurred, on the ground that it was not pleaded by attorney, although the plaintiff had appeared by attorney. The plaintiff did not join in demurrer, and judgment of non pros. was given in favour of the defendant on the 19th of August, 1839, for a return, as well as for 14*l*. 1*s*. 10*d*. for costs. A writ of recordari facias loquelam was delivered to the sheriff on the 24th of August. On the 19th of September, which was the next Court day, the defendant's costs were taxed. To the writ of recordari facias loquelam, the sheriff returned the plaint, and all the subsequent proceedings in the cause. The plaintiff then applied to quash the sheriff's return, and issue an attachment against the sheriff for not making a due return to the writ (a). This rule was made absolute, and the sheriff amended his return, by returning the plaint alone, as pending in his Court. The present rule was then obtained. The objection to the writ of pone per vados was, that the plaintiff had made it returnable on the 26th of May, which was out of Term, but which, by a mistake in all the almanacks, had been treated as the first day of Trinity Term. This being a mere mistake, *M. Smith* submitted, that the plaintiff would not be permitted to suffer in consequence of it. Then, as to the principal question, of whether final judgment could be considered as having been pronounced in the County Court, before the recordari facias loquelam was received by the sheriff; it was submitted, that the judgment pronounced amounted merely to an interlocutory judgment, and not to

(a) See the case reported, *ante*, vol. 8, p. 514.

a final judgment. According to *Gilbert's Replevin* (a), the defendant might have a writ of inquiry on the judgment, in order to assess his damages. Previous to the passing of the 7 Hen. 8, c. 4, and 21 Hen. 8, c. 19, a defendant in replevin could not recover his costs. It was so laid down at p. 165 of the work already cited. Those two statutes gave him damages and costs. The damages could only be assessed by a jury, and the costs being the consequence of the damages, no judgment could be final, until a writ of inquiry had been executed. By 17 Car. 2, c. 7, s. 2, which clearly applied to the present case, the defendant having avowed for rent in arrear, he was entitled to the costs of executing a writ of inquiry. By the cases of *Butler v. Bulkeley* (b), and *Doe d. Harvey v. Francis* (c), it appeared that the judgment could not be considered as final, until the actual taxation of costs took place. Being an interlocutory judgment, the plaint might be removed at any time before final judgment was signed. This appeared from the case of *Bevan v. Prothesk* (d). The marginal note of that case was, "Recordari facias loquellam stays all further proceedings in County Court, though delivered after interlocutory, if before final judgment." Again, in *Godley v. Marsden* (e), where a cause was removed from an inferior Court after interlocutory judgment, and before inquiry, the Court refused to award a procedendo. The case of *Walker v. Gann* (f) was distinguishable from the present. In that case, the Court granted a procedendo after interlocutory judgment, although final judgment had not been signed. But in that case a writ of inquiry was executed, and a verdict found for the plaintiff. In speaking of that case in *Godley and Marsden*, Chief Justice *Tindal* observed, "not only had judgment been suffered by default, but a jury had found damages upon inquiry, so that nothing remained, but the mere form of final judgment." Nothing of the kind was

1840.

WRIGHT

v.
LEWIS.

(a) P. 163.

(b) 1 Bing. 233; 8 Moo. 104.

(c) *Ante*, vol. 7, p. 193.

(d) 2 Burr. 1151.

(e) 6 Bing. 433; 4 Moo. & P. 138.

(f) 7 Dowl. & R. 769.

1840.

WRIGHT
v.
LEWIS.

the fact in the present case. It was true, that in the judgment, the amount awarded for costs was mentioned, but the affidavits clearly shewed that no taxation had taken place until the 19th of September, which was after the delivery of the writ of recordari facias loquellam. The present rule ought, therefore, to be discharged.

PATTERSON, J.—The mistake in the almanacks appears to have arisen from calculating Sunday as one of the four days which, pursuant to 11 Geo. 4, and 1 Wm. 4, c. 70, s. 6, the end of Easter Term and the commencement of Trinity Term were postponed, in consequence of the time at which Easter-day fell.

Butt, in support of the rule, contended, that the judgment in this case was a common law judgment for a return, and, therefore, was final. With respect to the argument, that the taxation of costs was necessary to render the judgment final, that was not the case. The judgment in the County Court was pronounced by the suitors, and, therefore, the taxation of costs which subsequently took place was not at all analogous to a taxation in the superior Courts. With regard to the observation, that this case was within the 17 Car. 2, c. 7, that was not so, as that statute only applied to writs executed in the superior Courts at Westminster. No doubt the defendant was entitled to his costs under the statutes, but as little doubt existed that he might waive that right, and take his judgment at common law. The case of *Perreau v. Bevan* (a) was an authority to that effect. The facts of this case were similar to those of *Walker v. Gann*, already cited, *Wyatt v. Markam* (b), and *Smith v. Sterling* (c). The Court in all those cases awarded a procedendo. For these reasons, the present rule ought to be made absolute.

Cur. adv. vult.

(a) 5 B. & C. 284; 8 Dowl. & Ry. 72.

(b) Barnes's Notes, 221.

(c) *Aste*, vol. 3, p. 609.

PATTESON, J.—This is a rule for a procedendo to the County Court, in a suit of replevin, and also to set aside the writ of pone per vadios. The latter part of the rule must be made absolute, because it appears that the writ was returnable on the 26th May, 1840, which was not in Term, the first day of Trinity Term being the 27th. The mistake arose from the almanacks being all wrong, but this cannot excuse the party. The first part of the rule must, I think, be discharged. The writ of re. fa. lo. was delivered to the sheriff on the 24th August. Judgment of non pros. had been pronounced on the 19th August, but the costs were not taxed until the 19th September. It is contended, that judgment was interlocutory, and it is conceded, that if it is so, the writ of re. fa. lo. was in time; and further, it is contended, that it was not a judgment until September 19th. If this had been a judgment at common law, for a return only, without anything said about costs, I should have been of opinion that it was final, and that it was a judgment on the 19th August. But it is not so, it is a judgment for a return, and for 14*l.* 1*s.* 10*d.* costs and charges. The specific sum is part of the judgment, and by the affidavits it appears that that sum was not ascertained until September 19th. It follows that the judgment was not complete until that time, and as no entry is made of judgment with costs hereafter to be taxed, I cannot take it to have been a judgment before the taxation. Again, the statutes of 7 Hen. 8, c. 4, s. 3, and 21 Hen. 8, c. 19, s. 3, first gave *costs* to the defendant upon the plaintiff being nonsuit or otherwise barred, but they gave those costs as consequential upon *damages*, and it is plain that they intended the damages and costs to be assessed by a jury. If, therefore, the defendant, in replevin, chooses to have the costs, he must have a writ of inquiry to assess the damages on which the costs are dependant; and it follows, that the judgment, being not simply for a return, is interlocutory, since it is necessary that a jury should inquire and give the costs as well as the damages. It has now become so much the practice for the officer of

1840.

WRIGHT
v.
LEWIS.

1840.

WRIGHT

v.

LEWIS.

the Court to tax costs of increase, that the costs given by the jury are almost forgotten, and when no damages are recoverable, as in the case of judgment for defendant, in all actions, except replevin, the costs are given by the Court without a jury, by virtue of various statutes. But whenever damages and costs are given by statute, as here, there can be no costs, strictly speaking, without damages, and damages can only be given by a jury. It is no answer to say that the defendant waives the damages: he cannot do so without waiving the costs also, and taking a judgment at common law simply for a return, which he has not done in this case. I am, therefore, of opinion, that whenever a defendant, in replevin, signs judgment of non pros. for a return and costs, it is essentially an interlocutory judgment, and requires the intervention of a jury to assess those costs, as consequential on the damages, which they alone can ascertain. Accordingly, it will be found, by the authorities cited in the note of Mr. Serjeant *Williams*, to *Mounson v. Redshaw* (a), that the course has been, to sue out on the judgment, a writ of retorno habendo and inquiry of damages. For these reasons, I am of opinion that the writ of re. fa. lo. was in time, and that the first part of this rule must be discharged, the costs to be costs in the cause.

Rule accordingly.

(a) 1 Saund. 195.

—◆—
In re HAWKER.

The Court of Q. B. will not direct the bill of an attorney for business done in bankruptcy, to be taxed by its own officer.

MARTIN applied for a rule to shew cause, why an attorney should not deliver up certain books, papers, &c. to the assignees of a bankrupt; and why he should not deliver his bill of costs; and why that should not be referred to the officer of this Court for taxation. The assignees had employed the attorney in question in certain matters of

bankruptcy, but he had subsequently ceased to act for them. The documents in question remained in his hands, and he had refused to deliver them up. No doubt, the Court would compel him, as one of its officers, to give up those documents, and deliver his bill. With respect, however, to taxation of that bill, it was doubtful whether this Court could grant that part of the application. The effect of 6 Geo. 4, c. 16, s. 14, was, that the officers of the Court of Bankruptcy should determine the amount of the solicitor's charges with respect to matters in bankruptcy, though as to charges respecting any actions at law or suits in equity the amount must be settled by the proper officer of the Court, in which, the business had been transacted.

1840.

In re
HAWKER.

PATTERSON, J.—I think that with respect to the taxation of the bill, you must apply to the Bankrupt Court, as this Court does not interfere with matters of this description in another Court. The remainder of the rule may be granted.

Rule granted accordingly.

REGINA v. JUSTICES of OXFORDSHIRE.

TALFOURD, Serjt., moved for a rule to shew cause, why a writ of certiorari should not issue, to bring up an order of the Court of Quarter Sessions for the county of Oxford. A person named Hastings had been convicted before a justice, and fined 10*l.*, under 15 Geo. 3, c. xl. s. 4, for neglecting to open a floodgate upon the river Isis, whereby the adjoining lands were overflowed, he being a lock-keeper upon that part of the Thames and Isis Navigation. Upon appeal to the Quarter Sessions for the county of Oxford, that Court mitigated the penalty to 5*l.*, but ordered the appellant to pay the costs of the appeal, and the present application was for a certiorari to bring up that order for the purpose

The Quarter Sessions have no power to give costs against an appellant under 15 Geo. 3, c. 11, s. 4. (The Thames and Isis Navigation Act.)

Semble, that the provision does not apply to the respondents.

1840.
 REGINA
 v.
 The Justices of
 OXFORDSHIRE.

of having so much of it as gave those costs, quashed. The navigation of the Thames and Isis was regulated by several statutes, local and public, and the statute under which Hastings had been convicted gave, by the 6th section, "the same benefit of appeal to the justices of the peace assembled at any Quarter Sessions, as is allowed in and by the said act of the 11 Geo. 3," which act (11 Geo. 3, c. 45, section 55), gave an appeal to the justices at Quarter Sessions to be held for the "counties of Middlesex, Surrey, Bucks, Berks, Oxford, or Wilts respectively, when the cause of appeal shall arise therein, and not elsewhere, who shall, in a summary way, either hear and determine the said complaint at such General or Quarter Sessions, or, if they think proper, adjourn the hearing thereof to the next general or Quarter Sessions of the peace, to be held for the said counties respectively, and if they see cause may mitigate any forfeiture or fine, and may order any money to be returned which shall have been levied in pursuance of such rule, bye-law, order, or determination, *and may also order such further satisfaction to the party injured* as they shall think reasonable." It was now argued, first, that under the words "further satisfaction" costs could not be given at all; but secondly, that even if they could be given under those words, they could only be given to the appellant, inasmuch as the power to give them was one of a series of acts enumerated to be done for the benefit of the appellant, and not for the respondent, who could never be a "party injured" within the meaning of the clause.

Keating shewed cause, in the first instance, and contended, as to this first point, that the words "further satisfaction" must be taken to mean *costs*, as it would be difficult to conceive what other satisfaction the legislature, in a case of this kind, could have contemplated. It could scarcely have been intended, by such loose expressions, to give the sessions power to award a pecuniary compensation, unlimited in amount, to the party injured; for, in

such case they should also find the facts necessary to warrant such judgment, as well as make an adjudication upon them. So that there would be not only an adjudication upon the merits of the original conviction, but also a collateral judgment upon a matter not cognizable by the justice whose decision was appealed from. Secondly, if the words "further satisfaction" included costs, then the respondent would clearly be a "party injured," to whom, they might be awarded, rather than the appellant; for, as the appeal clause, though contained in the previous statute, must be read as if incorporated with that creating the offence, not only might the respondent be the owner of the lands injured by the appellant's default, in allowing the water to overflow, but a stranger; and in case of the affirmance of the conviction, the latter would have been injured by being forced to resist a groundless appeal.

1840.
 REGINA
 v.
 The Justices of
 OXFORDSHIRE.

Talfourd, Serjt., in reply, contended, that the power to give costs could only be given by express words to the Quarter Sessions, there being no power to award them in the absence of such express authority; that in the same statute, sec. 18, the power to give costs was mentioned in express terms; and that inasmuch as the right to lay the information, under the section creating the offence, was not confined to the owner, the legislature never could have given a general power to be exercised in a possible case, which might or might not, under the construction contended for, be applicable to the respondent.

PATTERSON, J.—I think the certiorari must go. The words "further satisfaction," in the statute referred to, do not, in my opinion, mean costs; but rather any pecuniary or other compensation the injury inflicted might call for. Upon looking to the appeal clause this seems clear, for the appeal is thereby given, not only against a conviction by a justice, but also in case any person shall think himself

1840.
 REGINA
 v.
 The Justices of
 OXFORDSHIRE.

“aggrieved by any order or judgment made or given in pursuance of any rule, bye-law, or constitution” of the commissioners. Many cases, therefore, might arise, in which a party would be aggrieved by an order or judgment of the commissioners, in a way to require some further satisfaction than those specifically enumerated by the clause. Besides, in sec. 18 of the same statute, the power to give costs, on appeal, under certain circumstances, to the commissioners, is expressly given in these words, “and such commissioners, at such general meeting, shall hear and determine such appeal, *and give such costs to either party as they shall think reasonable,*” so that the legislature, when intending to confer the power of giving costs, in the very same statute, uses clear and unambiguous expressions for that purpose. As to the question, whether (supposing the sessions to have had the power to give costs) the words “party injured” could be construed to mean the respondent, as well as the appellant, it is unnecessary to decide; but I rather think the words could only mean the appellant. The certiorari, therefore, must go.

Keating said, that his Lordship’s opinion being clear upon the point, he would at once consent, to avoid delay and expense, that so much of the order as gave costs to the respondents should be quashed. The justices had no wish whatever improperly to extend their powers, their only object being to obtain the opinion of the Court upon the construction of the clause in question.

Rule absolute for a certiorari, and that so much of the order of sessions as gave costs to the respondents be quashed, the rest to stand.



1840.

REGAN v. SERLE and Another.

THIS was an interpleader rule, under section 1 of 1 & 2 Wm. 4, c. 58, obtained by the defendants, who were the acceptors of a bill of exchange. It appeared, that the bill in question had come to the hands of a person named Jones, in the regular course of his business. Subsequently, and before it became due, it was either lost by him or stolen from him. He then gave notice to the defendants not to pay the bill. After this, on the bill becoming due, it was presented for payment by a person named Regan, who said that he had taken it in payment of some liquor sold by him late at night in a gin-shop kept by him. The defendants refused to pay, and Regan brought an action in this Court against them. An action was also commenced against them by Jones, in the Court of Exchequer, as they refused to pay Jones, although an offer of indemnity to them was made. An application was afterwards made to a judge at Chambers to stay proceedings under these circumstances, and the present rule was then obtained. The amount of the bill was paid by the defendants into Court.

Actions were commenced by two persons, claiming to be the lawful owners of a bill of exchange, against the acceptor. The Court directed an issue to try who was lawfully entitled to recover on the bill, and relieved the acceptor from all claim in respect of costs.

Platt, in pursuance of the rule, appeared on behalf of Jones, and submitted, that the proper course to pursue would be to allow the present action to proceed, Jones giving a satisfactory indemnity in case Regan should succeed in his action.

Kelly, on behalf of Regan, submitted, that if an issue should be directed, wherein the defendants were not parties, the effect would be to deprive the plaintiff of the security of his costs, as against the defendants.

Martin, who appeared in support of the rule, on the part of the defendants, contended, that no arrangement which

1840.
 REGAN
 v.
 SERLE
 and Another.

did not relieve the defendants altogether from any liability, could be considered as effectuating the object of the act. As to any claim which Regan might have for costs, that could certainly not be enforced against the defendants. They had acted bonâ fide, and, therefore, were entitled to be relieved from any liability to past or future costs.

PATTESON, J.—The present defendants ought to be relieved altogether from having anything further to do with the cause. Mr. *Kelly's* argument would destroy altogether the effect of the Interpleader Act. I cannot, in this case, make Jones the defendant in the cause, and, therefore, all I can do is to direct an issue between Jones and Regan. I cannot at present say who is to pay the costs of the defendants up to the present time, as it must depend on the event of the issue. An issue must, therefore, be directed to try whether Regan was entitled to recover on the bill at the time of the commencement of the action, in which he will be plaintiff and Jones the defendant. This rule must be enlarged, and the question of costs reserved.

Rule accordingly.

Ex parte MARTINS.

Where a defendant seeks to be discharged out of custody, on the ground that the warrant of commitment, on which he is detained, is illegal, he must be brought before the Court, by a writ of habeas corpus, although it is sworn that he is too poor to bear the expense, as the validity of the warrant will not be discussed in his absence.

PALMER applied on behalf of a person named Martins, that he might be brought before the Court, on a writ of habeas corpus, for the purpose of being discharged, it being suggested, that the defendant was illegally detained in custody, on a warrant of commitment, pursuant to 5 Geo. 4, c. 83, s. 4. It was perfectly clear, that the warrant was substantially defective. The affidavit of the defendant stated him to be a common labouring man, in very poor circumstances, and that the expense of coming before

the Court, by a writ of habeas corpus, although it is sworn that he is too poor to bear the expense, as the validity of the warrant will not be discussed in his absence.

the Court, on a writ of habeas corpus, would greatly distress him. It was, therefore, proposed that the necessity for his appearance in Court should be waived, as was frequently done, where an application was made to bail a party who was in custody for felony. In such cases, where the party was poor, the Court allowed him to be bailed before a magistrate in the country, without the expense of a habeas corpus.

1840.

Ex parte
MARTINS.

PATTERSON, J., (After consulting Mr. Barlow of the Crown Office).—I am informed that it is never the practice to waive the necessity of a party's appearing before the Court on a habeas corpus, where the validity of a commitment is to be discussed. Where a defendant is in custody on a charge of felony, a certiorari issues to bring up the depositions, and a rule to shew cause is granted for the purpose of bailing him in the country before a magistrate. That practice, however, is confined to those cases. It is to be regretted that this defendant should be put to the expense of a habeas corpus, but I cannot alter the practice in this particular instance.

Rule granted accordingly (a).

(s) See *Rex v. Booker*, ante, vol. 2, p. 446, and *Regina v. Gregory*, ante, p. 129.

ELLIOTT v. KENDRICK.

(Before the four Judges.)

PLATT shewed cause against a rule nisi, obtained by *Jeffrey*, calling on the plaintiff to shew cause, why he could not give security for costs, and why the defendant A party having assigned his property for the benefit of his creditors, to certain
 tees, and afterwards taken the benefit of the Insolvent Act, and become bankrupt; in an
 on by the trustees, in his name, the Court required security for costs to be given to the de-
 lent, but refused to allow him to plead a release, which the bankrupt was willing to give.

1840.
 {
 ELLIOTT
 v.
 KENDRICK.

should not be at liberty to plead a release executed by the plaintiff. It appeared that the plaintiff, in the year 1837, had executed an assignment of all his property to certain trustees, for the benefit of his creditors. Pursuant to that assignment, the present action was brought in the name of the plaintiff by the trustees. Subsequent to this, in the year 1838, the plaintiff being completely insolvent, took the benefit of the Insolvent Act. Afterwards, in the year 1839, a fiat of bankruptcy was issued against him. The plaintiff was willing to execute a release of his interest in the cause of action. The object of the present rule, was, to compel the trustees, for whose benefit it was suggested, that the present action was brought to give security for costs, and at the same time to enable the defendant to plead the release in question. No precedent could be cited, in which the Court had compelled parties, under such circumstances, to give security for costs. The second branch of the rule was inconsistent with the former; because, it sought to treat the plaintiff as the party really interested in the cause, while the former branch required third parties to give security for costs, on the ground that they were the persons really interested.

Humfrey supported the rule, and contended, that the cases of *Heaford v. M'Knight* (a), *Doyle v. Anderson* (b), *Mylett v. Hucker* (c), *Beckham v. Knight* (d), *Andrews v. Marris* (e), *Wray v. Brown* (f), and *Denton v. Williams* (g), were authorities to shew, that, under such circumstances, the Court would compel the trustees to give security for costs. With respect to the second branch of the rule, as no fraud was suggested, and the plaintiff was willing to give a release, no objection existed to the defendant being allowed to plead it. He cited *Wild and Another v. Williams and*

(a) 4 D. & R. 81; 2 B. & C.
 579.

(b) *Ante*, vol. 2, p. 596.

(c) *Ante*, vol. 5, p. 647.

(d) *Ante*, vol. 6, p. 227.

(e) *Ante*, vol. 7, p. 712.

(f) *Ante*, vol. 8, p. 279.

(g) *Ante*, vol. 8, p. 123.

Another (a), where the Court held, that it would not set aside a plea of release given by one of several plaintiffs, unless a clear case of fraud was made out between the releasor and the defendant, and that fraud upon the releasor was not a ground for setting aside the plea, as that might be replied.

1840.
 ELLIOTT
 v.
 KENDRICK.

LORD DENMAN, C. J.—We think that the rule ought to be made absolute for compelling the plaintiff to give security for costs, and discharged as to that part which prays for leave to plead the release which has been mentioned.

LITLEDALE, J., and WILLIAMS, J., concurred.

COLERIDGE, J.—The argument in support of the first point is, that the plaintiff on the record, is not the real party in the cause ; but on the second point, it is sought to make use of him for the purpose of releasing the action.

Rule accordingly.

(a) 6 M. & W. 490.

Ex parte WYBROW.

COWLING applied on behalf of an attorney, named Wybrow, that he might be re-admitted without the usual notices. It appeared, from the affidavit supporting the application, that the last certificate taken out by the attorney, had expired on the 15th of November, 1839. In consequence of a mistake, the person employed to take out the certificate, did not take it out for the following year. The fact of this omission was not discovered until the morning the 16th of November immediately after the expiration, the omission made, the Court allowed him, on the 19th, to be re-admitted, without the usual notices, on payment of a fine of 20s., and the arrears of duty.

Where an attorney had, by mistake, omitted to take out his annual certificate in due time, and a year had elapsed from the expiration of his last certificate, he having discovered, on

1840.

Ex parte
WYEROW.

of the 16th of November, of the present year. On application at the Stamp Office, it was then ascertained that the attorney was off the roll, by force of 37 Geo. 3, c. 90, s. 31, and 54 Geo. 3, c. 144, ss. 13, 14. It did not appear, by the affidavit of the applicant, whether he had practised during the period which had elapsed since the expiration of his last certificate. It was, however, sworn, that no intention existed on the part of the attorney to defraud the revenue. The application was made on the 19th of November.

PATTESON, J.—I must take it, that the attorney has practised during the last year. An attorney ought to take out his annual certificate every year, between the 15th of November, and the 16th of December. Here, it was not taken out before or on the latter day. From that time, therefore, he was practising as an uncertificated attorney, and became liable for so practising, though he was not actually off the roll, until the 15th of the present month of November, as the year during which he had not taken out his certificate expired at that time. Taking it out before the 15th, would not have prevented him from being subject to the liabilities attached to practising without a certificate, but would only prevent him from being off the roll. In the case of *Ex parte Minchin* (a), the attorney had practised; but in a case which came before me the other day (b), he had not. I think that as I must assume the attorney to have practised during the year, in the present case, he may be re-admitted, but on payment of a fine of 20*s.* and of the duty for the past year.

Order accordingly.

(a) *Ante*, vol. 5, p. 253. (b) *Ex parte Knipe, ante*, p. 108.

1840.

BRANDSON *v.* DIDSBURY.*(Before the four Judges.)*

KNOWLES applied for a rule to shew cause, why the verdict found in this case, in favour of the plaintiff, should not be set aside, and a new trial had. The amount of the verdict was 8*l.*, and the ground of the present application was, that the defendant had been taken by surprise. It was admitted, that where the verdict amounted to a less sum than 20*l.*, if the objection was, that the verdict was against evidence, the Court would not interfere with the finding of the jury. Here, however, the objection did not come within the principle of those cases.

Where a verdict is for a sum less than 20*l.*, unless practice or fraud on the part of the plaintiff is shewn, the Court will not disturb the verdict on the ground of surprise.

LORD DENMAN, C. J.—Such a case as the present comes within the spirit of the rule adopted by the Courts as to new trials, where the motion is made, on the ground of the verdict being against evidence, and the amount of the damages is less than 20*l.* I think, therefore, that there should be no rule, where the verdict amounts to so low a sum, unless fraud or practice on the part of the plaintiff is shewn.

LITTLEDALF, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule refused.

1840.

Ex parte HIGGINBOTHAM.

By the 39 Geo. 3, c. 79, certain places are declared to be disorderly within the meaning of the 36 Geo. 3, c. 8, and a penalty is attached to certain offences committed in those places. Those offences are still punishable under the former act, although the latter was only passed for a limited period.

The 2 & 3 Vict., which requires certain proceedings to be prosecuted in the name of the attorney or solicitor general only applies to penalties for publishing printed papers, not having the printer's name, &c., attached, and not to offences under 36 G. 3, c. 8, and 39 G. 3, c. 79.

J. COBBETT moved for a rule to shew cause, why a writ of certiorari should not issue to certain magistrates, for the purpose of removing a conviction into this Court, in order to quash it. The conviction in question was in a sum of 20*l.*, against the defendant, on an information exhibited against him for receiving money to admit persons into a room where a lecture was publicly given, "On the formation of Character." The conviction professed to be founded on the 39 Geo. 3, c. 79, s. 15. That section declared certain places disorderly, within the meaning of 36 Geo. 3, c. 8, if money was paid for admission thereto, and if any person received money for admission, he was rendered liable, in case of conviction, to a penalty of 20*l.* That penalty must be considered as only to be inflicted under the provisions of 36 Geo. 3, c. 8. That statute, however, was only in force for three years, and having expired, no such offence, as that which was here made the subject of conviction, could be considered as in existence. On the face of the conviction, it appeared, that it had been made at the instance of a private individual, whereas it ought to have been prosecuted by the attorney or solicitor general. That this was so, appeared from the provisions contained in the 2 & 3 Vict. c. 12, s. 4, which provided, "That it shall not be lawful for any person or persons whatsoever, to commence, prosecute, enter, or file, or cause or procure to be commenced, prosecuted, entered, or filed, any action, bill, plaint, or information, in any of her Majesty's Courts, or before any justice or justices of the peace, against any person or persons, for the recovery of any fine, penalty, or forfeiture made or incurred, or which may hereafter be incurred under the provisions of this act, unless the same be commenced, prosecuted, entered, or filed in the name of her Majesty's attorney general or solicitor general, in that part

of Great Britain, called England." That act appeared by the preamble, to be passed for the purpose of amending the 39 Geo. 3, c. 79, and although it might seem to be confined to certain printed papers whereon the printer's name should appear, yet by sec. 6, it was provided, "That the said act, and all acts made for the amendment thereof, except so far as herein repealed or altered, shall be construed as *one* act, together with this act." The effect of that provision must be to render it necessary that all penalties under the 39 Geo. 3, should be sued for in the name of the attorney or solicitor general. This construction was further supported by the provisions contained in sec. 5, of the 2 & 3 Vict. c. 12. By that section it was enacted, that persons sued before the passing of that act, for penalties incurred under 39 Geo. 3, c. 79, might apply to the Court, or to a judge to stay proceedings upon certain conditions. The words of the section were, "Any pecuniary penalty or penalties incurred under the said recited act."

1840.

Ex parte
HIGGIN-
BOTHAM.

PATTESON, J.—I do not see how the act of Victoria affects the question. The 4th section provides, that penalties under that act are to be the subject of proceedings by the attorney or solicitor general. No doubt the statute does not expressly say that the penalties so to be recovered, are those that which respect printers, but those must be the penalties intended, and those only. The 6th section clearly meant that as to the subject matter of the act, the 2 & 3 Vict. c. 12 was to be construed as one act with the 39 Geo. 3, c. 79. The 5th section must be limited in a similar manner, as referring only to penalties relating to printers. Then with respect to the other objection. The 36 Geo. 3, c. 8, was to continue in force for three years, and until the end of the next session of Parliament. That period would expire in the same session as that in which the 39 Geo. 3, c. 79, passed. Although the latter act passed in that session, it is to be supposed that its provisions contained in sec. 15,

1840.

Ex parte
HIGGIN-
BOTHAM.

were to cease from operation at the end of that session. I cannot think that the legislature intended anything so absurd, and, therefore, in my opinion, there is nothing in that objection.

Other objections were urged, on which his Lordship was of opinion that there should be a

Rule granted.

SMITH v. CLARK.

(*Before the four Judges.*)

If a notice to quit is served on the tenant's wife, at the house, accompanied by a statement that the paper delivered, is "a notice of discharge," it is sufficient.

DUNDAS applied for a rule to shew cause, why the verdict found in favour of the defendant, in this case, should not be entered for the plaintiff. It was an action of trespass tried before *Coltman*, J., at the summer assizes for Yorkshire. One issue on the pleadings was, whether a notice to quit had been duly served upon the plaintiff. The proof was, that the party who desired to effect the service had delivered the notice to the wife of the plaintiff, at the door of his house, at the same time stating, that the paper was "a notice of discharge," the question left to the jury was, whether they could infer from this evidence, that the notice had reached the plaintiff. The jury were of opinion that it had, and accordingly found the verdict on that issue, in favour of the defendant. It was now submitted that sufficient evidence had not been given of the notice having come to the hands of the plaintiff, and, therefore, that the jury were wrong in finding a verdict in favour of the defendant on the issue. He cited the case of *Doe dem. Buros v. Lucas* (a) where it was held that the mere leaving of a

(a) 5 Esp. 153.

notice to quit at the tenant's house, without further proof of its being delivered to a servant, and explained, or that it came to the tenant's hands, is not sufficient to support an ejectment. The case of *Jones dem. Griffiths v. Marsh* (n), was to the same effect.

1840.

SMITH

v.

CLARK.

LORD DENMAN, C. J.—I think the service was clearly sufficient.

LITTLEDALE, J., WILLIAMS, J. and COLERIDGE, J., concurred.

Rule refused.

(a) 4 T. R. 464.

In the matter of Arbitration between HIGHAM and JESSOP.

SIR W. FOLLETT and ADDISON shewed cause against a rule nisi, obtained by *Hoggins*, for setting aside the award made in this case. A variety of grounds was stated in the rule, but that on which the Court proceeded was, that the award had been made by the umpire, after the expiration of the time limited by the agreement of reference for that purpose. It appeared, that the matters in dispute between the parties, had been referred by certain articles of agreement, bearing date the 11th of January, 1839, to two persons, who were appointed arbitrators, with power to appoint an umpire. The time limited in the agreement for making the award by the arbitrators was the 1st day of the following month of May. It was further witnessed that in case of disagreement between them, and the umpire made the award, it should be made "within two calendar months next after the said matters shall be referred to him." The

By an agreement of reference to arbitrators, with power to appoint an umpire, it was covenanted that the umpire should make his award two calendar months after his appointment. He was appointed on the 29th of June, and afterwards the time for making his award was enlarged by consent, for three months further. The Court held that the 29th of June was to

be excluded from the calculation of time, and, therefore, that the award being made on the 29th of November, was made in due time.

1840.
In the matter of
HIGHAM
and
JESSOP.

agreement did not grant any power either to the arbitrators or the umpire, for the purpose of enlarging the time to make their respective awards. The parties met on the 27th of April, and agreed to enlarge the time, within which the arbitrators were to make their award for three months. The arbitrators, on the 29th of June, not being able to agree, duly appointed an umpire. To him, the matters of difference were accordingly referred. The parties, afterwards on the 19th of August, gave to the umpire "the further period of three calendar months for making his award and umpirage, of and concerning the several matters so referred as aforesaid, in addition to, and in augmentation of, the time given to the said umpire for that purpose, by the within mentioned agreement." The umpire made his award on the 29th of November. Higham, the party against whom the award was made, wrote to the umpire on the 29th of November, informing him that that was the last day on which his award could be made. The objection was, that the award had been made without power on the part of the umpire, as it had been made after the time, within which it ought to have been made. In support of this objection, it was contended, that the umpire having been limited to make his award within two months after the matters were referred to him, and that reference had been made on the 29th of June, that day was to be taken into calculation, and, therefore, the two months mentioned in the agreement, expired on the 28th of the following August. It was further contended, that by analogous reasoning, that the three months additionally given by the parties for making the award expired on the 28th of November. In answer to the rule, however, it was submitted, that the 29th of August could not be taken into the calculation of the time which had been granted in addition. To shew this to be the rule, the cases of *Pellew v. The Hundred of Wonford* (a), *Hardy v.*

(a) 9 B. & C. 134 ; 4 M. & R. 130.

Ryle (a), *Watson v. Pears* (b), *Thomas v. Popham* (c), *Blunt v. Heslop* (d), *In the matter of Hick* (e), and *Lawrence v. Hodgson* (f), were clear authorities; but after the letter which Higham had written to the umpire, it was not competent for him to contend, that the award being made on the 29th of November was too late. The case of *Hallett v. Hallett* (g), was an authority to shew that the letter of Higham amounted to a consent that the award should not be made until that day.

1840.

In the matter of
HIGHAM
and
JESSOP.

Cresswell and *Hoggins* supported the rule, and contended, that the award was made one day too late, as the 29th of August ought to be included in the three months, for which the enlargement took place. With respect to the case of *Hardy v. Ryle*, which had been cited on the other side, it was distinguishable from the present, as it was held there, that the plaintiff, being the party who had been wrongfully imprisoned, had a right to six months, after the cessation of his imprisonment, during which he might bring his action against the magistrate. No general rule could be laid down on this subject. In the case of *Lester v. Garland* (h), the marginal note was, that there is "no general rule, in computing time from an act or an event, that the day is to be inclusive or exclusive; depending on the reason of the thing, according to the circumstances." If the principle there laid down, was applied to the present case, it must be quite clear that the 29th of August must be excluded from the calculation.

PATTESON, J.—There was a case of *Williams v. Burgess* (i), decided in the full Court, in which it was held, that in reckoning the time within which a warrant of attorney must be

(a) 9 B. & C. 603; 4 M. & R.

296.

(b) 2 Camp. 294.

(c) Dyer. 218, b.

(d) 3 Nev. & P. 553; 8 A. & E. 577.

(e) 8 Taunt. 694.

(f) 1 Y. & J. 16.

(g) *Ante*, vol. 7, p. 389.

(h) 15 Ves. 248.

(i) Not yet reported.

1840.
 In the matter of
 HIGHAM
 and
 JESSOP.

filed, pursuant to 3 Geo. 4, c. 29, s. 1, the day of the execution is not to be included.

Cresswell. The present case was distinguishable from that, as by the express words of the act of Parliament, the warrant of attorney is required to be filed within twenty-one days after its execution. That of course must mean from the act of execution itself. The day on which that was done must, of course, be excluded from the calculation, unless the Court took notice of the fraction of a day. (a) As to the letter written by Higham to the umpire, that could not authorise the latter to defer the making of his award until too late. All that the letter informed the umpire, was, that the 29th was the latest day for making the award, but did not state that it ought to be made sooner.

PATTESON, J.—I have some doubt whether it is competent for Higham to take this objection at all, after giving notice to the umpire, that the 29th was the last day for making his award. But, looking at the documents in the case, I am of opinion, that the umpire had a right to make his award on the 29th of November. By the agreement of reference, it is provided, that the arbitrators shall, in the first instance, be bound to make their award by the 1st of May. Then, in case of their disagreement, they are to appoint an umpire. The time for making the award was then enlarged by the parties until the 1st of August. Within that enlarged time, the arbitrators appoint the umpire, that is to say, on the 29th of June, and the umpire was to make his award within two calendar months after the matter was referred to him. On the 19th of August the parties further enlarged the time given by the agreement for three

(a) In the case of *Chick v. Smith*, ante, vol. 8, p. 337, it was held, that where a defendant died between 11 and 12 o'clock in the morning, and a writ of fi. fa. was sued out against his goods between 2 and 3 o'clock in the afternoon of the same day, the Court would set aside the writ as irregular.

months. I think, that according to the authority of the cases cited, as to the calculation of time, the umpire was entitled to make his award on the 29th of November. It having been made on that day, it was made within the time limited by the parties, and, therefore, the present rule must be discharged.

Rule discharged, with costs (a).

(a) See *Young v. Higgon*, ante, of time in a notice of action against vol. 8, p. 212, as to the calculation a magistrate.

1840.
In the matter of
HIGHAM
and
JESSOP.

IN RE EATON.

(Before the four Judges.)

PLATT and **MONTAGU SMITH** shewed cause against a rule nisi, obtained by the Attorney General, for setting aside a writ of habeas corpus, and an order for the discharge of a person named Eaton, made at Chambers, by *Patteson*, J. The affidavits shewed, that the defendant had been committed for an offence against the 4 & 5 Wm. 4, c. 13, (the Smuggling Act). A writ of habeas corpus was subsequently sued out, on the 12th of September, from the plea side of the Court. On this, the defendant was brought to the Chambers of Mr. J. *Patteson*, and the solicitor for the Customs appeared to oppose his liberation. After hearing certain objections to the commitment, the learned judge made an order for the discharge of the prisoner. The solicitor for the Customs was unaware at the time of discussing the objections, that the writ of habeas corpus had not issued from the Crown side of the Court, in accordance with the regular practice. As soon as he discovered it, he applied to *Patteson*, J., to rescind the order. This, however, his lordship refused to do. The present rule was accordingly obtained. It was now contended, that the writ of habeas corpus need not issue from the Crown side of this Court. The statutes of 31 Car. 2, c. 2, and 56 Geo. 3, c. 100, only required that the writ should issue upon a judge's fiat, and under the seal of the Court. Here, the writ had issued on a judge's fiat, and under the seal of

A proceeding under the Smuggling Act, the 4 & 5 Wm. 4, c. 13, is a "criminal matter," and, therefore, a writ of habeas corpus to bring up a defendant who has been committed under that act, should issue from the Crown side of the Court. But if it is issued from the Plea side, the objection only amounts to an irregularity, which is waived, if the solicitor for the Customs appearing before a judge to oppose the defendant's liberation, does not take the objection previous to an order for the defendant's discharge being made.

1840.

In Re
EATON.

the Court, and, therefore, a sufficient compliance with the statutes had been yielded. But, according to the practice of the Court, the writ could only issue from the Crown side in criminal cases. But the proceeding under the Smuggling Act was not a criminal case, for it merely subjected the party to a pecuniary penalty. *Hantley v. Luscombe*(a), shewed that it was very doubtful whether an offence against the Excise laws could be considered as "a criminal matter." In *Ex parte Beeching* (b), the Court intimated that a proceeding under the Smuggling Act was not a criminal matter. The 4 & 5 Wm. 4, c. 13, merely gave an additional power to justices to proceed in such cases, but did not alter the nature of the offence committed. But, if it was necessary that the writ should issue from the Crown side of the Court, its issuing from the plea side, could have no greater effect than to render it irregular. Being then an irregularity, it had been waived by the solicitor for the customs not objecting to the irregularity when the matter was under discussion before the judge at Chambers. Any objection which existed, ought to have been taken at that time.

Sir *J. Campbell*, *A. G.*, and *T. F. Ellis*, supported the rule, and contended, that the proceeding under the Smuggling Act was clearly a criminal matter. If the proceeding had been by information for the recovery of penalties, it might perhaps be said, that this was not a criminal matter. But the proceeding before a magistrate, where a party was committed for an offence against the act, must clearly be considered as a criminal matter. This distinction was pointed out in the case of *Huntley v. Luscombe*, already cited, and in the case of *The Attorney General v. Bowman*, in a note to that case. Assuming it then to be a criminal matter, the case of *John Taylor*(c) shewed that the defendant must be brought up by a habeas corpus issued on the Crown side of the Court. Then, as to the question of waiver. The Crown could not waive an ob-

(a) 2 B. & P. 530.

(b) 6 D. & R. 209; 4 B. & C. 136.

(c) 3 East, 232.

jection of which its officer did not know, and of which he was not bound to know. It was sworn that the solicitor of the customs did not know of the defect in question, and he was not bound to know it, because the gaoler, and not the Crown, was before the judge. Under these circumstances, the present rule ought to be made absolute.

1840.

In re
EATON.

LORD DENMAN, C. J.—Whenever the law imposes the punishment of imprisonment for the commission of a particular act, it no doubt considers that act in the light of an offence against the public. That clearly brings it within the class, called criminal matters. According to the decision in *Taylor's case*, it seems, that this writ should have issued from the Crown side of the Court, and not from the plea side. The non-issue of it, however, from the Crown side, does not render it a nullity, but merely makes it irregular. The objection, therefore, is capable of being waived. At first, we doubted whether any certain means existed of ascertaining whether this writ had not issued from the Crown side, but the officer informed us, that all writs thence issued bear his signature. Here, that signature was not attached to the writ. Not being so, the solicitor of customs should have been aware that it had not issued from the Crown side. He ought, therefore, to have taken the objection before the judge, when the matter was discussed. Not having done so, he must be considered as having waived it. The present rule, therefore, must be discharged.

LITTLEDALE, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule discharged.

1840.


REGULA GENERALIS.

IT is ordered, that the rule relating to enlarged rules made in Michaelmas Term, in the 30th year of his late Majesty, King George the Second, and the several rules relating to the peremptory paper made in Hilary Term, in the 6th year, in Hilary Term, in the 15th year, in Michaelmas Term, in the 17th year, in Hilary Term, in the 36th year, and in Easter Term, in the 41st year of his late Majesty, King George the Third, be rescinded. And it is further ordered, that no further rules be placed in the peremptory paper, (except as to the cases already set down therein,) be abolished, and that, in future, all enlarged rules shall be drawn up for the first and other days in the next term, in the order in which they shall have been enlarged, and in such number for each day as the Master may see fit, and either party may bring on such enlarged rules, and the Court will dispose of them in the same manner as if brought on in the Term in which they were moved for respectively.

By the Court.

COURT OF EXCHEQUER.

Hilary Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

PARKER and Another v. SMART.

1841.

DEBT on a bond, dated in June, to recover 3,000*l.*, with interest at five per cent. from 1st of March preceding. The bond was impressed with a 7*l.* stamp. It was objected, at the trial, on behalf of the defendant, that this stamp was not sufficient, as the bond being given in June, to secure the interest previously due, was, in fact, given to secure 3,000*l.* plus the interest from the 1st of March, to the date of the bond. The learned judge overruled the objection, but reserved leave for the defendant to move to enter a nonsuit.

A bond dated in June, was conditioned for payment of 3,000*l.*, with interest, at 5 per cent., from March preceding: *Held*, that a 7*l.* stamp was sufficient.

Bere, having, on a former day, obtained a rule nisi accordingly,

Cockburn shewed cause A stamp which covers the principal sum is sufficient, *Pruessing v. Ing* (a), *Dixon v. Robinson* (b), *Foreman v. Jeyes* (c), *Dearden v. Binns* (d). There is no difference in principle, where the interest is to be calculated from a preceding day. A promissory note for the payment of 30*l.* at a future day, with interest from the date, is equally as much an instrument to secure a sum

(a) 4 B. & Ald. 204.

(c) 5 C. & P. 419.

(b) 1 M. & Rob. 115; 5 C. & P. 96.

(d) 1 Man. & Ry. 130.

1841.
 PARKER
 and Another
 v.
 SMART.

exceeding 30*l.*, as the bond in the present case is to secure a sum exceeding 3,000*l.*, yet a stamp covering the 30*l.*, has been held sufficient, *Pruessing v. Ing* (a). The true test by which to discover what is principal, and what is interest, is by ascertaining on what sum the further interest is to accrue, here, it is on the 3,000*l.*, and not on the additional sum, which was due for interest from the 1st of March, to the date of the bond.

Bere, in support of the rule. The stamp is not sufficient. The words of the act are, "any definitive and certain sum of money;" here the definitive and certain sum of money is the 3,000*l.* plus the interest up to the date of the bond, *Dickson v. Cass* (b). [*Parke*, B.—I question much, whether *Dickson v. Cass* can be supported after *Paddon v. Bartlett* (c) and *Doe v. Snaith* (d).] The question is, what is due at the time the security is taken? It can make no difference, that it is secured under the name of interest.

PARKE, B.—I think the stamp is sufficient. The words "definitive and certain sum" cannot correctly apply to interest, the amount of which depends on the length of time which elapses before the money is repaid. The stamp to be imposed is to be in proportion to the principal sum secured.

ALDERSON, B.—The interest is in the nature of damages for the detention of the principal, the definitive sum is the sum mentioned in the bond.

GURNEY, B.—There is no distinction between bye-gone and future interest.

Rule discharged.

(a) 4 B. & Ald. 204.

(b) 1 B. & Ad. 343.

(c) 2 Ad. & Ell. 9.

(d) 8 Bing. 146.

1841.

WARD v. LLOYD, and Another.

IN this case, the indorsement on the copy of the writ of summons, of the name of the attorney suing out the writ, required by the 2 Wm. 4, c. 39, s. 12, was as follows:—
 “This writ was issued by A. B., of, &c., attorney for the said —”, without mentioning whom. The form given in the schedule to the act, No. 1, is “This writ was issued by E. F., of —, attorney for the said A. B.”

Where the copy of a writ of summons was indorsed “This writ was issued by A. B., of, &c., attorney for the said —” without mentioning whom, the Court set aside the copy and service for irregularity.

G. T. White, having, on a former day, obtained a rule to set aside the copy and service thereof,

Humphrey shewed cause, and cited *Hennah v. Whyman* (a).

ROLFE, B.—The indorsement is certainly insufficient. The form is given as an example, and should be followed.

Rule absolute.

(a) 2 C., M. & R. 239.

HUMPHREYS v. O'CONNELL.

ASSUMPSIT by indorsee against acceptor of a bill of exchange, drawn by one H. Barnett, for 500*l.*, payable six months after the date thereof, and indorsed by H. Barnett to Moss and Humphreys, and by them to the plaintiff.

Pleas, First, that long before the drawing or accepting the said bill of exchange, in the first count of the declaration mentioned, to wit, on the 1st day of February, in the year of our Lord, 1839, and on divers other days and times, afterwards, and before the 22nd day of April, in the year of

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, 1st. that the drawer lent to the defendant certain sums of money for the purpose of gaming, and that for securing pay-

ment of the same, the defendant accepted certain bills of exchange, in lieu of which the bill declared on was given, and that the plaintiff had notice of the premises. 2ndly, a similar plea, alleging that the drawer, and certain persons, to the defendant unknown, won money of him, by gaming. *Held*, that *de injuria*, was a good replication.

1841.
HUMPHREYS
v.
O'CONNELL.

our Lord, 1839, the said H. Barnett did knowingly lend to the defendant, and the defendant did borrow of him, divers sums of money, amounting, to wit, to 650*l.*, for the purpose of enabling the defendant illegally to game and play therewith, at a certain illegal game, played with dice, called or known by the name of French hazard, contrary to the form of the statute, in such case made and provided; and the said H. Barnett, at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid; and that for securing the payment of the said sums so lent, as aforesaid, he, the defendant, afterwards, to wit, on the 22nd day of April, in the year of our Lord, 1839, accepted three several bills of exchange, drawn by the said H. Barnett, upon, and directed to the defendant, and payable to the said H. Barnett, one of the same being for the payment of 200*l.*, one month after the date thereof, another of the same, being for the payment of 200*l.*, two months after the date thereof, and the other of the same, being for the payment of 250*l.*, three months after the date thereof; and the defendant says, that long before the drawing or acceptance of the said bill, in the said first count mentioned, to wit, on the 26th day of May, in the year of our Lord, 1839, and on divers other days and times afterwards, and before the 29th day of August, in the year of our Lord, 1839, the said H. Barnett did, knowingly, lend to the defendant, and the defendant did borrow of him, divers other sums of money, amounting, to wit, to 565*l.*, for the purpose of enabling the defendant to game and play therewith, at a certain illegal game, played with dice, called or known by the name of French hazard, contrary to the form of the statute, in such case made and provided; and the said H. Barnett, at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid; that the said two bills, so payable at two months and three months after the date thereof, being overdue and unpaid, and the said sum of 565*l.* being also unpaid to the said H. Barnett, he, the defendant, in

consideration thereof, and for and on account of those two bills, and as a security for the payment of the same, and also of the said sum of 565*l.*, accepted the said bill in the said first count mentioned; and also a certain other bill drawn by the said H. Barnett, and directed to the defendant for the payment of 515*l.* to the said H. Barnett, or order, eight months after the date thereof, and the said H. Barnett drew the said bills for and upon that consideration, and on that account; and the defendant further says, that the said Moss and Humphreys, and the plaintiff, respectively, before the said indorsements to them respectively, had full knowledge and notice of the premises aforesaid. Verification.

Second. And for a further plea in this behalf, the defendant says, that long before the drawing or accepting the said bill of exchange, to wit, on the 1st day of February, in the year of our Lord, 1839, and on divers other days and times afterwards, and before the 22nd day of April, in the year of our Lord, 1839, the said H. Barnett, and divers other persons, whose names are to the defendant as yet unknown, did win of the defendant, and the defendant did lose to them, divers sums of money, amounting, to wit, to 650*l.* by gaming, and playing at a certain illegal game, played with dice, called or known by the name of French hazard, contrary to the form of the statute, in such case made and provided; and for securing the payment of the said sums so won and lost as aforesaid, he, the defendant, afterwards, to wit, on the 22nd day of April, in the year of our Lord, 1839, accepted three several bills of exchange, drawn by the said H. Barnett, upon and directed to the defendant, and payable to the said H. Barnett, (it then described the bills, as in the first plea); and the defendant says, that also long before the drawing or acceptance of the said bill, in the said first count mentioned, to wit, on the 26th day of May, in the year of our Lord, 1839, on divers other days and times, afterwards and before the 29th day of August, in the year of our Lord, 1839, the said H. Barnett, and divers other persons, whose names are to this deponent as yet unknown, did win of the defendant, and the defend-

1841.

HUMPHREYS
v.
O'CONNELL.

1841.
 HUMPHREYS
 v.
 O'CONNELL.

ant did lose to them, divers other sums of money, amounting, to wit, to 565*l.*, by gaming and playing at a certain illegal game, played with dice, called or known by the name of French hazard, contrary to the form of the statute, in such case made and provided; and the defendant further says, that the said two bills, so payable at two months and three months after the date thereof, being over-due and unpaid, and the said sum of 565*l.*, being also unpaid by the defendant to the winners thereof, he, the defendant, in consideration thereof, and for and on account of those two bills, and as a security for the payment of the same, and also of the said sum of 565*l.*, accepted the said bill, in the said first count mentioned; and also a certain other bill, drawn by the said H. Barnett, and directed to the defendant for the payment of 515*l.*, to the said H. Barnett, or order, eight months after the date thereof, and the said H. Barnett drew the said bills, for and upon that consideration, and on that account: and the defendant further says, that the said Moss and Humphreys, and the plaintiff, respectively, before the said indorsement to them, respectively, had full knowledge and notice of the premises aforesaid. Verification.

The third plea was the same as the first, except that it averred want of consideration instead of notice.

The fourth was the same as the second, except that it averred want of consideration instead of notice.

Replication de injuriâ.

Special demurrer. Assigning for causes, that the matters of defence alleged in the said pleas, do not amount to an excuse for the non-performance, by the defendant, of his promise, but those matters shew, that the defendant never was liable to perform that promise, and that the said promise was totally void, and, by the illegality thereof, the defendant was wholly discharged, by law, from performing the same; and the defendant never was liable to pay the said bill to the plaintiff, under the facts stated in the said plea; and also that it is bad for duplicity.

Willis, in support of the demurrer. The only question

is, whether the plea consists of matter of excuse? It is submitted, that it does not. A plea may point either to the time of making the contract, or to the time between the contract and breach, or to the time after the breach. In the last case, the general replication would be clearly bad, *Jones v. Senior* (a). Where the matter pleaded, applies to the time between the contract and breach, it is admitted that *de injuriâ* would be a good replication. But where the matter stated in the plea, exists at the time of making the contract, and shews that there never was a contract which could be enforced in a court of law, there the general replication is inadmissible, *Parker v. Riley* (b). In the present case, the contract being tainted with illegality, was wholly void, *Com. Dig.* tit. "*Condition*," (D 7). *Isaac v. Farrar* (c), will, perhaps be cited on the other side; but that case was decided on the ground of the inconvenience which would have otherwise followed, and the Court said, "that if the general replication were not allowed, it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it; for it would seldom happen that a plaintiff, if he were tied down to dispute one fact, could take issue on such allegation, and then he would be obliged to take an issue, which would admit the fraud, and throw the proof of value on himself, thereby placing him in a worse situation than before the new rules." But in the present case, that inconvenience could not arise. A similar plea was pleaded in *Edmunds v. Groves* (d), and the plaintiff there replied, that the note was indorsed to him, without notice of the illegality, and for good and sufficient value and consideration; and it was held, that on those pleadings, the illegal making of the note was not so admitted as to render it necessary for the

1841.

 HUMPHREYS
 v.
 O'CONNELL.

(a) *Ante*, vol. 6, p. 701; 4 M. & W. 123.

(b) *Ante*, vol. 6, p. 375; 3 M. & W. 230.

(c) *Ante*, vol. 4, p. 750; 1 M. & W. 65.

(d) 2 M. & W. 642.

1841.
 HUMPHREYS
 v.
 O'CONNELL.

plaintiff to give any evidence of consideration. [*Parke*, B.—That was an action by indorsee against the maker of a promissory note; here, it is not between the indorsee and drawer, but the indorsee and acceptor. The plea states two propositions; *vis.*, the original illegality, and that the plaintiff had notice. In *Parker v. Riley*, there was a direct illegality between the two parties to the action.] The plaintiff having had notice that the bill was given for a gaming debt, it was illegal in him to take it. Before the 5 & 6 Wm. 4, c. 41, bills given for a gaming consideration were void, even in the hands of a bonâ fide holder, *Edwards v. Dick* (a), and Lord Abinger, C. B., in *Edmunds v. Groves*, expressed some doubt as to whether that act really had the effect intended. [*Parke*, B.—In *Noel v. Rich* (b), the Court held the replication good, though the plea sought to avoid the contract on the ground of fraud.] That was the case of a general demurrer.

Henderson, contra, was stopped by the Court.

LORD ABINGER, C. B.—The plea is clearly matter of excuse.

PARKE, B.—This case must be governed by *Isaac v. Farrar*. As between these parties, the bill is not void, on the ground of illegality; the defendant contracts to pay the plaintiff, and the fact of notice to him of the illegality is mere excuse for the non-performance of the contract.

Judgment for the Plaintiff.

(a) 4 B. & Ald. 212.

(b) *Ante*, vol. 4, p. 228.

ARNOLD v. EVANS.

S.C. 10. 11. Decr. 120.

THIS was an action against four defendants, on a bill of exchange. The defendants having suffered judgment by default,

In an action against several defendants on a bill of exchange, if they let judgment go by default, service of a rule to compute on one is sufficient.

Streeten moved to make absolute a rule, to compute principal and interest on the bill, and produced an affidavit of service on two of the defendants. He referred to *Figgins v. Ward(a)*, in which *Bayley, B.*, observed, that "by suffering judgment to go by default, the defendants acknowledge a joint cause of action, and, therefore, quoad hoc they are partners: service, therefore, on one, is good for all."

PARKE, B.—That is a sufficient authority.

Rule absolute.

(a) *Ante*, vol. 2, p. 364; 2 C. & M. 424. *23. 11. Decr. 125.*

GILLET v. GREEN.

WHATELEY moved for a rule, calling upon the defendant to shew cause, why the Master should not tax the plaintiff his treble costs, pursuant to the 5 & 6 Wm. 4, c. 83, s. 3. This was an action for infringing a patent, and it appeared that a prior action, between the same parties, had been tried before *Coltman, J.*, on which occasion the plaintiff obtained a verdict, and the learned judge certified, under 5 & 6 Wm. 4, c. 83, s. 3, that the validity of the patent came in question before him. By the above act, if such certificate be given in evidence in another suit, the patentee is entitled to treble costs, in the event of a verdict

In an action for infringing a patent, the judge certified under the 5 & 6 Wm. 4, c. 83, s. 3, that the validity of the patent came in question. In a subsequent action between the same parties, the plaintiff obtained a verdict, with 1s. damages, and the certificate was

given in evidence, in order to obtain treble costs. Ten days before the trial of the latter action the 3 & 4 Vict. c. 24, came into operation, but no application was made to the judge to certify under that act: *Held*, that the plaintiff was not entitled to any costs.

A certificate under the 3 & 4 Vict. c. 24, must be given *immediately* after the trial: *Semble*, even before another cause is called on.

1841.

GILLETT
v.
GREEN.

passing in his favour (a). The present action, for infringing the same patent, was tried before Lord *Abinger*, C. B., on the 13th July, 1840, when he certified, that the former cause of *Gillett v. Smith*, was in evidence before him. The plaintiff obtained a verdict, with 1*s.* damages. Ten days before the trial, the 3 & 4 Vict. c. 24, came into operation, but no application was made to the judge to certify under that act. The second section of 3 & 4 Vict. c. 24, enacts, if the plaintiff in any action of trespass or trespass on the case, shall recover less damages than 40*s.*, the defendant shall not be entitled to recover any costs whatever, unless the judge “shall *immediately afterwards* certify” that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance, for which the action shall have been brought, or that the trespass or grievance was wilful and malicious. The Master had refused to tax the plaintiff treble costs, on the ground that he had not obtained the certificate of the judge under the last mentioned statute. In support of the application, it was contended, that the 3 & 4 Vict. c. 24, s. 2, did not affect the right to treble costs under the 5 & 6 Wm. 4, c. 83, s. 3, nor did it apply to cases where it appeared, by the

(a) Which enacts, that “if any action at law, or any suit in equity, for an account, shall be brought in respect of any alleged infringement of such letters patent, heretofore, or hereafter granted, or any scire facias to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them, upon the merits of the suit, it shall be lawful for the judge, before whom such action shall be tried, to certify on the record, or the judge who shall make such decree or order, to give a certificate under his hand,

that the validity of the patent came in question before him; which record or certificate, being given in evidence in any other suit or action whatever, touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs.”

pleadings, that a bonâ fide right actually came into question. *Shuttleworth v. Cocker* (a) was referred to, in which a certificate, under 3 & 4 Vict. c. 24, was amended after the trial, and it was urged, that on the authority of that case, the learned judge, who tried the cause, might now grant a certificate.

1841.

GILLETT

v.
GREEN.

PARKE, B.—If we had any doubt about the matter, we should grant a rule to shew cause. This is certainly an unfortunate case; but it is clear that the act of 3 & 4 Vict. governs this case, because it applies to “any action of trespass or trespass on the case.” But then it is said, that the Lord Chief Baron has the power of certifying at the present time. That is not so; for the statute expressly says, that the plaintiff shall not recover costs from the defendant, unless the judge, before whom such verdict shall be obtained “shall immediately afterwards certify.” That was not done in the present instance. It may even be a question whether a judge has power to grant a certificate after another cause has been called on.

ALDERSON, GURNEY, and ROLFE, Bs., concurred.

Rule refused.

(a) *Ante*, p. 76. See *Morgan v. Thorne*, *post*, 226.

SLATER v. HAINES.

THIS was a rule, calling upon J. W., a sheriff's officer, to shew cause, why he should not refund to the defendant, the residue of the value of certain goods which had been seized and sold under a fi. fa., issued at the suit of the plaintiff, after deducting the amount indorsed on the writ, and also all lawful charges, and why an attachment should

Though a sheriff is put to extra trouble and expense in making a levy, he cannot claim larger fees than those allowed by the table of fees, framed under

the 7 Wm. 4, and 1 Vict., c. 55.

1841.

SLATER
v.
HAINES.

not issue against him for a contempt, in demanding and taking other and greater fees than allowed by the table of fees framed under the 7 Wm. 4, and 1 Vict. c. 55 (a).

It appeared that the defendant's goods had been seized by an officer of the sheriff of Lincolnshire, under a writ of *fi. fa.*, issued at the suit of the plaintiff, and indorsed to levy 33*l* 17*s*. The goods were afterwards sold by public auction, except one chair, which was sold by private contract, for 3*s*. A pig of the value of 1*l* 5*s*. was lost, while in the possession of the sheriff. The proceeds of the sale, including the chair, amounted to 44*l* 13*s*. 7*d*., being 10*l* 16*s*. 7*d*. more than the sum indorsed on the writ. That money was retained by the sheriff's officer, and a statement was made by him that he was short of his levy, 5*l*; he also refused to account for the pig which had been lost. From an affidavit made by the sheriff's officer, it appeared that he claimed 1*s*. interest on the levy for fourteen days, 1*l* for the writ, and 2*l* 0*s*. 10*d*. for sheriff's poundage and warrant, making, together with the levy, 36*l* 18*s*. 10*d*. to which sum an objection was made. The residue was claimed for sundry incidental expenses, not allowed by the schedule of fees, some of which were occasioned by precautions taken to prevent a rescue, others by the employment of carpenters in the removal of the goods for sale, and for travelling expenses, commission on sale by auction, &c.

Humfrey shewed cause. The charges which are com-

(a) Section 2 enacts, "that from and after the passing of this act, it shall be lawful for sheriffs or their officers concerned in the execution of process, directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time, be allowed by any officer of the several courts of law, at Westminster,

charged with the duty of taxing costs in such Courts, under the sanction and authority of the judges of the said Courts respectively."

Section 3, provides, that any sheriff or officer, taking more than is allowed by the Court, shall be adjudged guilty of a contempt of Court.

plained of as being excessive, have all been occasioned by circumstances over which the officer had no control, and a portion of which resulted from the violent conduct of the defendant himself, which made it absolutely necessary to employ as many as five men, during several nights, for the safe custody of the goods. [*Parke, B.*—These are expenses which are not allowed in the schedule, made in pursuance of the 7 Wm. 4, and 1 Vict. c. 55. There is nothing in that act relating to any such expenses, nor is there any provision allowing greater or other expenses than those mentioned in the schedule]. These are such expenses as the Master ought to allow, on taxation. Suppose there had been a rescue of the goods. [*Parke, B.*—What does the sheriff do for his poundage? He surely must do something; he is very well paid by it, to enable him to meet incidental expenses, and must take the risk of that]. If no charges are to be allowed except those in the schedule, it will be a great hardship on the sheriff.

1841.

SLATER
v.
HAINES.

Whitehurst, contra, was stopped by the Court.

LORD ABINGER, C. B.—The proceeds of the property which was not sold, cannot, of course, be refunded, but if not accounted for, the defendant may bring his action. Under the circumstances, it is not necessary to punish the officer by attachment, but he must refund the money improperly charged, and pay the costs of this application.

Rule absolute, to refund 7*l.* 15*s.* 9*d.*, with costs.



1841.

DEANE v. KNOTT.

The defendant having been discharged under the Insolvent Act, as to a debt due to the plaintiff, afterwards gave the plaintiff a bond for a new debt, and included in it the sum for which he was discharged. The bond having been put in suit, the defendant suffered judgment by default, and was taken in execution:

Held, that he was not entitled to be discharged out of custody, for, the bond was, at all events, good, as to the new debt: and *Semble*, per *Parke, B.*, that the defendant, having neglected to plead his discharge, as to the old debt, was liable to be taken in execution for that amount also.

THIS was a rule, calling on the defendant to shew cause, why an order of *Rolfe, B.*, discharging him out of custody, should not be set aside. It appeared that the defendant being in prison, in February, 1831, petitioned the Insolvent Court for his discharge. On that occasion, he filed his schedule, in which he inserted a debt of 80*l.*, due from him to the plaintiff, and obtained his discharge. Subsequently, the defendant gave to the plaintiff a bond for a new debt of 220*l.*, and included in the bond, the debt as to which he was discharged. In April, 1839, the plaintiff put the bond in suit, and judgment was signed for want of a plea, and the defendant was taken on a ca. sa. *Rolfe, B.*, having made an order for the defendant's discharge out of custody, a rule was obtained to set it aside, against which

Miller shewed cause. The defendant is entitled to his discharge. The bond in respect of which the execution issued, was given to secure a new debt, as well as the debt of 80*l.*, in respect of which the defendant had been discharged from custody, under the Insolvent Act. That bond was in fraud of the creditors, and in violation of the Insolvent Act, the policy of which is, that a debtor shall be released from the pressure of his debts, that he may employ his future efforts in satisfying in a just proportion, the demands of all his creditors. The bond having been given partly to secure a debt, which was inserted in the insolvent's schedule, its effect is to enable the plaintiff to obtain a disproportionate share of the future property of the insolvent, *Jackson v. Davison*, (a), *Tabram v. Freeman* (b), shew that the bond is void.

(a) 4 B. & Ald. 691.

(b) 2 C. & M. 451 ; 4 Tyr. 180.

Ogle contra. The defendant is not entitled to be discharged. The case of *Philpot v. Aslett* (a), is in point. There, a debtor having been discharged under the Insolvent Act, contracted a new debt, for which, as well as for the old debt, he accepted a bill of exchange. Being sued upon the bill, he gave a warrant of attorney for the amount, and the Court refused to set it aside.

1841.

DEANE

v.
KNOTT.

PARKE, B.—The question is, whether the discharge can be altogether supported? It clearly cannot, for it is impossible to say, that because the bond is bad as to part, it is bad altogether. If the defendant wished to avail himself of the Insolvent Act, he should have pleaded his discharge from the sum of 80*l.*, and might, to that extent, have reduced the amount of the plaintiff's demand. The security is not illegal, in respect of the new debt, indeed, my impression is, that it is not illegal at all. The law says, that if a party who has been discharged under the Insolvent Act, is arrested on mesne process, for a debt, in respect of which he is entitled to the benefit of the act, he may apply for his discharge. But if an action is brought against him, and instead of pleading his discharge, he allows the plaintiff to obtain final judgment against him, it is his own default, and the law must take its course. The rule to rescind the order for the defendant's discharge must be made absolute.

The other Barons concurred.

Rule absolute (b).

(a) 1 C., M. & R. 85; 4 Tyr.
729.

(b) See *Kay v. Masters*, ante,
vol. 1, p. 86.

1841.

MORGAN, (an Infant, by his next friend) v. THORNE.

In an action of trespass tried on the 27th of June, 1840, the plaintiff obtained a verdict, with 1*s.* damages, leave being reserved for the defendant to move to enter a nonsuit, the judge having been applied to, to certify under the 43 Eliz. c. 6, s. 2, declined to do so, until the motion for a nonsuit should have been disposed of. On the 3rd of July following, the 3 & 4 Vict. c. 24, came into operation. The motion for a nonsuit was not made, and on the 9th of November, the judge certified: *Held*, that the certificate was null and void.

THIS was an action of trespass, brought by the father of a minor, for criminal conversation with his son's wife. The cause was tried on the 27th of June, 1840, at the Middlesex Sittings, after Trinity Term, before Lord Abinger, C. B., when the plaintiff obtained a verdict, with 1*s.* damages, leave having been reserved for the defendant to move to set aside that verdict, and enter a nonsuit. Upon the finding of the verdict, application was made to the learned judge to certify, to deprive the plaintiff of costs, under the 43 Eliz. c. 6, s. 2, but he declined to do so, until the motion for a nonsuit had been disposed of. On the 3rd of July following, the 3 & 4 Vict. c. 24 (*a*), came into operation. The motion for a nonsuit was not made, and on the 9th of November, his Lordship granted the certificate prayed for. The present rule was afterwards obtained, calling on the

(*a*) Sect. 1, after reciting the 43 Eliz. c. 6, and 22 & 23 Car. 2, enacts "that the said recited act of the 43 Eliz., so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the 22 & 23 Car. 2, as relates to costs in personal actions, be, and they are hereby repealed."

Section 2, enacts, "that if the plaintiff, in any action of trespass, or of trespass on the case, brought, or to be brought, in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40*s.*, such plaintiff shall not be entitled to recover or obtain from the de-

fendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer, before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance, for which the action shall have been brought, or that the trespass or grievance, in respect of which the action was brought was wilful and malicious."

defendant to shew cause, why the Master should not tax the plaintiff his costs, notwithstanding the certificate.

1841.

MORGAN
v.
THORNE.

C. C. Jones shewed cause. The 43 Eliz. c. 6, was in force at the time the cause was tried, and the certificate applied for. The certificate has a retrospective effect, and must be considered as granted at the time.

J. Bayley, contrâ. The 43 Eliz. c. 6, s. 2, was repealed before the certificate was granted, and it is clear, that the power given by that statute, to deprive the plaintiff of costs, did not exist after the 3 & 4 Vict. came into operation. The certificate, therefore, is wholly inoperative. In *Kay v. Goodwin* (a), the Chief Justice says, "I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions, which were commenced, prosecuted, and concluded, whilst it was an existing law." The present action was clearly not concluded whilst the second section of the 43 Eliz. c. 6, was an existing law, for no judgment has yet been signed. [*Parke*, B.—The case of *Charrington v. Meatheringham* (b), supplies the principle which must govern this case]. There, the 13 Geo. 3, c. 78, which gave treble costs on a nonsuit, to persons sued for anything done in pursuance of that act, had been repealed by the 5 & 6 Wm. 4, c. 50, which directed the costs to be taxed as between attorney and client. The plaintiff had been nonsuited in an action brought for a matter done in pursuance of the former act, which action was tried before the latter act came into operation, but no judgment was signed until afterwards; and this Court held, that the defendants were not entitled to treble costs. So here, the 43 Eliz. having been repealed, the certificate is null and void.

(a) 6 Bing. 576.

(b) *Ante*, vol. 5, p. 313; S. C. 2 M. & W. 228.

1841.

MORGAN
v.
THORNE.

Jones then asked for leave to move to set aside the verdict, and enter a nonsuit, upon an affidavit, stating, that he had abstained from doing so, solely on account of his belief that the certificate would be granted. He urged, that as the certificate was of no avail, the defendant ought to be placed in the same position as if it had not been granted.

LORD ABINGER, C. B.—If the certificate had been granted during the Sittings, it would probably have been good, notwithstanding the 43 Eliz. has been repealed, because the Sittings might, for this purpose, have been considered as one day. However, the effect of the 3 & 4 Vict. is entirely to repeal the 43 Eliz. and this certificate, therefore, cannot operate to deprive the plaintiff of costs.

Rule absolute (a).

(a) See *Gillett v. Green*, ante, p. 219, *Shuttleworth v. Cocker*, ante, p. 76. The plaintiff in the case in the text would be entitled to his full costs, notwithstanding the 3 & 4 Vict. c. 24, because, as the certificate was a nullity, and the late statute was not in force at the time of the trial, he was in the same situation as a plaintiff with whose right to costs, the judge had not interfered when the statute of Elizabeth was in force.

MORGAN, (an Infant, by his next Friend) v. THORNE.

The wife of a minor having committed adultery, the minor's father procured himself to be appointed prochein amy, and commenced an action for criminal conversation, without the knowledge or authority of his son :

Held, that he was entitled to do so, and that a judgment in that action would be a good bar to any proceedings for the same cause by the son, when of age.

A prochein amy is a guardian appointed by the Court, and may sue without any authority from the minor.

AFTER the above rule was disposed of, *Kelly* obtained a rule to shew cause, why all proceedings in the action should not be set aside, with costs, on the ground that the action had been brought by the father of the minor without his knowledge or authority. It appeared, that the father had been appointed prochein amy, for the purpose of the suit, but that at the time of his appointment, the son was in India with his regiment, and could have known nothing of the proceedings.

Thesiger and *Bayley* shewed cause, and objected, first, that the application was too late. The defendant was not justified in waiting until step after step had been taken in the cause, but ought to have applied to the Court within a reasonable time after his knowledge, that the son had given no authority to bring the action. By the delay, the defendant has placed the plaintiff in a different situation, and has caused him to incur considerable expense. But, secondly, it was competent for the father to bring the action, in order to protect the honour of his son. In the ordinary cases of injury to a child, the action is brought in the name of the father, though, perhaps, from the tender years of the child he never could have given an authority for that purpose. Many cases may arise, in which, if the father was not allowed, of his own accord, to bring the action, the remedy would be wholly lost. For instance, if after a marriage of this description, the son became a lunatic, and the father was satisfied that the wife had committed adultery, would he not be entitled, as the natural guardian of the son, to vindicate his honour? The mere fact of the son having given no authority to commence the action, is not sufficient to warrant the Court in setting aside the proceedings. A prochein amy is liable to costs, he cannot be examined as a witness, and is, in all respects, the real plaintiff on the record. In the *Abridgment of Cases in Equity* (a), it is said, "Any one may bring a bill as prochein amy to an infant without his consent, because it is at his peril that he brings it to be answerable for the event; but none can bring a bill in the name of a feme covert as her prochein amy, without her consent, and if such a bill be brought upon her affidavit of the matter, it will be dismissed." But at all events, a subsequent ratification of the father's act would render it valid, and that has been done in the present case. On the 1st of September, 1840, the son, being then at Bangalore, by deed, appointed his father guardian for all suits, and

1841.

MORGAN
v.
THORNE.

(a) Vol. 1, p. 72.

1841.
MORGAN
v.
THORNE.

more especially for a suit then instituted in the Ecclesiastical Court.

Kelly, in support of the rule. The principle upon which the Courts interfere to set aside proceedings commenced without authority is, that though judgment be obtained by the plaintiff on the record, yet the party really interested is not bound thereby, but may at any time come forward and institute a fresh action. The judgment recovered in the one action would be no bar to the other. [*Parke*, B.—Have you any authority for saying that the law is so with respect to actions brought by a *prochein amy*? *Alderson*, B.—Is it not clear that a *prochein amy* may be appointed by the Court without the assent of the infant? The statute of Westminster 2, c. 15, enacts, that “In every case where such as be within age may sue, it is ordered, that if such within age be esloigned, so that they cannot sue personally, their next friends shall be admitted to sue for them.” So that a Court of law exercises the same description of power to the appointment of a *prochein amy*, as the Court of Chancery in the appointment of a guardian; the infant cannot disavow his *prochein amy*]. If the father had been appointed by the Court with a full knowledge of the circumstances, the case might have been different. With respect to the instance put by the other side, it is conceded, that if an infant be incapable of exercising any judgment or discretion, the Court, upon being informed of the fact, would appoint a guardian for him, otherwise his remedy would be lost; but in the present case there is a person capable of exercising his discretion and judgment, and who may wholly disavow the act of his father. [*Alderson*, B.—In *Fitzherbert’s Natura Brevium* (a), it is said, “A man shall not answer as guardian unto an infant who is plaintiff or defendant without a warrant, but as *prochein amy* to an infant, he shall sue an action without warrant.” That shews that

(a) P. 26.

1841.

MORGAN

v.

THORNE.

a *prochein amy* is a guardian appointed by the Court]. Lord *Coke*, in his reading upon the statute of Westminster 2, c. 16, says (*a*), "Upon this statute, whether an infant be esloigned or no, he shall sue by *prochein amy*, for the esloignement is put in this act to shew what mischief may fall out in this case, and, therefore, when a serjeant offered that oath should be made of the esloignement of the heir, the judge said he would take it upon his honesty; but if the surmise that the plaintiff is within age be untrue, and that the plaintiff is of full age, his admittance by *prochein amy* is error." [*Parke*, B.—The distinction between guardian and *prochein amy*, is pointed out by the Court in *Simpson v. Jackson* (*b*)]. The question as to whether an infant is benefited by the appointment of a *prochein amy*, depends upon the circumstances under which it has taken place, if it is made upon a suggestion of that which is false, or upon a suppression of the truth, the Court will set it aside. In this case, there is nothing to prevent the infant from bringing a fresh action. If a party pays a debt to another who sues in the creditor's name, but without his authority, such payment will not protect the debtor from a subsequent action at the suit of the creditor, *Robson v. Eaton* (*c*). The only difference in this case is, that the party sues as *prochein amy* instead of by attorney. [*Parke*, B.—That is a material distinction; an attorney is appointed by the party, but a *prochein amy* by the Court]. As to the objection, that the application is too late, it is stated by affidavit, that the defendant did not know, till very lately, that the action was brought without the authority of the son.

PARKE, B.—I am of opinion that the rule must be discharged. If it was necessary, in order to protect the defendant, that an authority should have been given by the infant to commence proceedings, I agree that there is no proof of such authority prior to the action; and if the case

(*a*) 2 Inst. 390.(*c*) 1 T. R. 62.(*b*) Cro. Jac. 640.

1841.

MORGAN
v.
THORNE.

turned upon the justification of the father's act by the infant, there is no evidence that the latter knew of it. But the valid objection is, that the application comes too late. On the 29th May, the defendant was cognizant of facts, which should have led him to inquire whether or no the father had any authority to bring the action. He knew that the son was a cornet in the East India Company's service, and must have had reason to suspect that the action was brought without his express authority. However, it seems to me, that no authority is required to enable a *prochein amy* to sue; and I cannot distinguish this case from any other action brought by a *prochein amy*. It is true that we have not the petition for the appointment of a *prochein amy* before us. Nor do we know the particular circumstances under which he was appointed; but in the absence of any proof to the contrary, we must assume that the proceedings were in the ordinary and regular mode; if, indeed, there had been any fraud or misrepresentation, that should have been brought before the Court by affidavit. Then it is contended, that if the defendant paid the damages and costs in this action, he might be, nevertheless, liable to another action at the suit of the son. But that objection will not apply to an action brought by *prochein amy*. The law knows no distinction between an infant of tender years, and an infant near twenty-one; in neither case is it necessary to give any authority to sue. It is clear, by reference to the authorities adverted to, that a *prochein amy* is an officer of the Court, appointed by the Court, and there is no doubt that the judgment in this action would be a bar to any proceedings by the son when of mature age.

ALDERSON, B.—I am clearly of the same opinion. It seems to me, that we have nothing whatever to do with the question, as to whether the infant has or has not assented to the appointment of *prochein amy*. If we were to inquire into that fact, we must also do so in the case of a child three years old, who has received some personal injury. It is

impossible that a child of that age could have given any authority, and yet the Court may appoint a *prochein amy* for him. The case falls within the equity of the statute of Westminster 2, c. 15, and it is enough to shew that the infant cannot sue personally, and then the Court may appoint a *prochein amy*. The appointment being the act of the Court, cannot require confirmation; it amounts to an appointment of an attorney; the law in effect makes the Court the attorney of the infant. But, even if the argument of Mr. *Kelly* was correct, it is clear that the application comes too late.

1841.
MORGAN
v.
THORNE.

GURNEY, B., concurred.

ROLFE, B.—If Mr. *Kelly* could make out his proposition, then I agree that the recovery in this action would not be a bar to another, at the suit of the son. But he has not shewn that the father was not properly appointed *prochein amy*. He has likened the case to that of a party suing by attorney in the ordinary mode, and has referred to an authority to shew, that where an action is commenced against a debtor, in the name of a creditor, without the authority of the latter, the debtor may be compelled to pay the money again. But, the judgment in that case proceeded on the ground, that the person represented on the record as the attorney of the creditor, had never, in fact, been appointed attorney. But here, it is not shewn that the plaintiff has not been appointed *prochein amy*; if that had been done, the cases would have been parallel.

Rule discharged.

1841.

MABERLY v. PITTERTON.

The 21 Jac. 1, c. 12, s. 5, applies to all constables; therefore, a constable appointed under the Municipal Corporation Act, is entitled on discontinuance, to double costs, under the former statute.

A suggestion is only necessary, when there would otherwise be an inconsistency on the record; and need not, therefore, be entered to give a party double costs.

THIS was an action for assault and false imprisonment, against a constable appointed under the provisions of the Municipal Corporation Act, (5 & 6 Wm. 4, c. 76.) Notice of trial had been given, and subsequently the plaintiff discontinued.

Gunning had obtained a rule nisi, to enter a suggestion for double costs, under the 21 Jac. 1, c. 12, s. 5.

Byles shewed cause. The defendant has been appointed a constable, under the 76th section of the 5 & 6 Wm. 4, c. 76(a). He is not, therefore, entitled to double costs,

(a) Section 76 enacts, "That the council to be elected for any borough shall, immediately after their first election, and so from time to time, thereafter as they shall deem expedient, appoint, for such time as they may think proper, a sufficient number of their own body, who, together with the mayor of the borough, for the time being, shall be, and be called the watch committee for such borough; and all the powers hereinafter given to such committee, may be executed by the majority of those who shall be present at any meeting of such committee, the whole number present at such meeting being not less than three; and such watch committee shall, within three weeks after their first formation, and so, from time to time thereafter, as occasion shall require, appoint a sufficient number of fit men,

who shall be sworn in before some justice of the peace, having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace; and the men so sworn, shall not only within such borough, but also within the county in which such borough, or part thereof shall be situated, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has, or hereafter may have within his constablewick, by virtue of the common law of this realm, or of any statutes made, or to be made, and shall obey all such lawful

under the statute of James, but to costs as between attorney and client, under the 133rd section (a) of the Municipal Corporation Act. At the time of the assault complained of, the defendant was acting in the execution, and under the powers of the 5 & 6 Wm. 4, c. 76. At all events, a suggestion is not necessary, *Finlay v. Seaton* (b), *Fosbrooke v. Holt* (c), *Wells v. Ody* (d).

1841.
 MADELY
 v.
 PITTEBTON.

Gunning, in support of the rule. The defendant was not acting in the execution of the 5 & 6 Wm. 4. It is true that he was appointed under the provisions of that statute, but the act complained of was not done by him in pursuance thereof, within the meaning of the 133rd section. As soon as he was appointed constable, he became as much as any other constable entitled to the protection of the

commands as they may, from time to time, receive from any of the justices of the peace, having jurisdiction within such borough, or within any county in which they shall be called on to act as constables, for conducting themselves in the execution of their office."

(a) Section 133, enacts, "That all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice, in writing, of such action, and of the cause thereof, shall be given to the defendant, one calendar month, at least, before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act, and the special

matter in evidence, at any trial to be had thereupon; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made, before such action brought, or if a sufficient sum of money shall have been paid into Court, after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action, after issue joined, or if upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs, as between attorney and client, and have the like remedy for the same, as any defendant hath, by law, in other cases."

(b) 1 Taunt. 210.

(c) *Ante*, vol. 4, p. 700; 1 M. & W. 205.

(d) *Ante*, vol. 3, p. 799; 2 C., M. & R. 184.

1841.
MADERLY
v.
PITTEKTON.

statute of James. It is the usual practice to enter a suggestion in a case like the present (a). In *Finlay v. Seaton*, the cause had been tried, and the defendant obtained a verdict, and in *Fosbroke v. Holt*, the Court disposed of the rule, on the ground that the plaintiff had offered to pay double costs.

LORD ABINGER, C. B.—It seems to me, that the defendant is entitled to the protection of the statute of James. In the first instance, he is appointed under the provisions of the Municipal Corporation Act, but he acts not in the execution of that statute, but in the performance of his duty as a constable. He is then entitled to the same protection as any other constable. As to the other point, I think, a suggestion is not necessary, therefore, the plaintiff will not be entitled to the costs of this application.

PARKE, B.—It is usual to enter a suggestion in cases like the present, but I am of opinion, that it is not necessary. A suggestion is only requisite, in order to account for apparent inconsistency on the record. For instance, under the statutes which give a defendant costs, though there has been a verdict against him, there it is necessary to enter a suggestion, otherwise the record would be inconsistent. But here, the defendant is entitled to costs, and the only question is, as to their amount? When the costs are once taxed, it does not appear whether they are double or single. With respect to the other question, I agree that the defendant, when once appointed, acts as a constable, and not in the execution of the Municipal Corporation Act, within the meaning of the 133rd section. He is, therefore, entitled to the protection of the statute of James.

ALDERSON, B.—The statute of James applies to all con-

(a) Chit. Arch. 1199.

stables, however appointed. The 133rd section of the Municipal Corporation Act, applies only to the case of special powers exercised under that act.

1841.

MADERLY
v.
PITTERTON.

GURNEY, B., concurred.

Rule accordingly.

WINSOR v. HERBERT.

ASSUMPSIT for work and labour as an attorney and solicitor. Plea, that the plaintiff before, and at the time of the accruing of the causes of action in the declaration mentioned, was an attorney of the said Court here. And that the said sum is claimed by the plaintiff to be due for work done and materials for the same provided, and for fees in respect thereof; and for money therein paid by the plaintiff as the attorney of and for the defendant, in and about certain proceedings at law, to wit, in the said Court here, which had been commenced and prosecuted against the defendant, and wherein the plaintiff acted as the defendant's attorney, and for him. And the defendant further says, that although the plaintiff did, before the commencement of this suit, to wit, on the 1st day of June, in the year of our Lord 1840, deliver unto the defendant a bill of the plaintiff's fees, charges, and disbursements for and in respect of the said work and materials, fees and money so done, provided, and paid as aforesaid, subscribed with the proper hand of the plaintiff according to the statute in such case made and provided; yet a month from such delivery had not before the commencement of this suit expired. And the defendant further says, that the plaintiff did not at any other time before the commencement of this suit, deliver unto the defendant, or leave for him at his dwelling-house or last place of abode, any other bill of the plaintiff's

Where business is done by an attorney for a person who afterwards becomes an attorney, the former need not deliver a signed bill previously to bringing an action against the latter.

1841.

WINSOR
v.
HERBERT.

fees, charges, and disbursements for or in respect of the said work, materials, fees, and money so done, provided, and paid as aforesaid, or any of them, or any part of them subscribed with the proper hand of the plaintiff according to the statute in such case made and provided. Verification.

Replication. That after the accruing of the said causes of action and before the commencement of this suit, to wit, on, &c., the defendant was duly admitted and enrolled an attorney of the Court of our Lady the now Queen herself, and that the defendant before and at the time of the commencement of this suit, was, and still is, such attorney. Verification.

Special demurrer, assigning for causes, That the plaintiff in and by the replication, admits that the plaintiff before, and at the time of the accruing of the causes of action, was an attorney of and in the said Court, and that the said sum is claimed by the plaintiff to be due for work done and materials for the same provided, and for fees in respect thereof, and for money therein paid by the plaintiff as the attorney of and for the defendant in and about certain proceedings in law commenced and prosecuted against the defendant, and wherein the plaintiff acted as the defendant's attorney and for him. And the plaintiff in and by the said replication, further admits, that a month from the delivery of the plaintiff's signed bill of fees, charges, and disbursements as in the said last plea mentioned, had not expired before the commencement of this suit; and then the plaintiff in and by his said replication to the said last plea, avers, that after the accruing of the said causes of action to which the said last plea is pleaded, and before the commencement of this suit, the defendant became, and was, and still is an attorney, which averment is immaterial and impertinent, and does not amount to an avoidance of the matters which are alleged in the said last plea, and which stand admitted in and by the said replication to the said plea. And also, for that the said replication does not aver, that at the time of the

accruing of the said causes of action, to which the said last plea is pleaded, the defendant had been duly admitted and enrolled an attorney of any Court. And also, for the said replication does not shew that the business done by the plaintiff for the defendant was agency business by the plaintiff as an attorney, and that the defendant was then an attorney. And also, for that the said replication does not properly confess and avoid. And also, for that the said replication does not aver that a month from the delivery of the said bill mentioned in the said last plea, had expired before the defendant was duly admitted and enrolled an attorney as in the said replication mentioned. And also, for that the said replication is in other respects informal and insufficient, &c.

1841.
 WINSOR
 v.
 HERBERT.

W. H. Watson, in support of the demurrer. It appears on the pleadings, that the plaintiff delivered a signed bill, and that afterwards, and before the expiration of a month prior the time of the delivery, the defendant was duly admitted an attorney; the question then is, whether, under those circumstances, the plaintiff can maintain an action before the month has expired? There is nothing in the statute to shew that he can. The 2 Geo. 2, c. 23, s. 23, enacts, "that no attorney, &c., shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after such attorney, &c., shall have delivered unto the *party to be charged therewith*, or left for him at his dwelling house or last place of abode, a bill of such fees, &c., which bill shall be subscribed with the proper hand of such attorney." That statute is general in terms, and applies to all persons to be charged by the bill, whether attorneys or not. The 12 Geo. 2, c. 13, s. 6, provides, that the 2 Geo. 2, c. 23, shall not extend to any bill of fees, charges, and disbursements due from any attorney or solicitor, to any other attorney or solicitor, or clerk in Court, but every

1841.
 WINSOR
 v.
 HERBERT.

such attorney, &c., may use such remedies for the recovery of his fees, &c., against such other attorney or solicitor, as he might have done before the passing of the said act. The object of these statutes was to afford protection to unprofessional persons, and the latter act only applies to the case of business done by one attorney for another. But it is preposterous to say, that if a person, not being an attorney, is indebted for fees, and afterwards he becomes an attorney, that he is not to be allowed to have the bill taxed. If such doctrine prevail, the only mode of trying the reasonableness of the charges would be by a jury. In *Weymouth v. Knight* (a), the Court held, that they had no authority, either at common law or by statute, to direct the taxation of an agency bill. [*Parke, B.—Ford v. Maxwell* (b) expressly decided, that to enable one attorney to maintain an action against another, for business done for the latter before he became an attorney, it is not necessary to deliver a signed bill.] That case is certainly in point, but it is doubtful whether it is good law.

PARKE, B.—It is enough to say that the point has been already considered, and that it has been decided that the 2 Geo. 2, c. 23, does not apply to the case of a person who becomes an attorney after the business is done. There is no reason why we should construe the statute differently.

Lord ABINGER and ROLFE, Bs., concurred.

Lush, contra, was to have argued in support of the replication.

Judgment for the Plaintiff.

(a) 3 Scott, 764.

(b) 2 H. Bl. 589..

1841.

DOWNES v. BOSTOCK.

WIGHTMAN had obtained a rule for judgment as in case of nonsuit. It was a country cause, and issue had been joined on the 26th of May, 1840, but no notice of trial given.

In a country cause issue was joined on the day before Trinity Term, and no notice of trial was given.

Held, that a motion for judgment as in case of a nonsuit, in the following Hilary Term, was premature.

Miller shewed cause, and objected, that the motion was premature; it was now settled, that when issue is joined in a country cause in an issuable term, judgment as in case of a nonsuit cannot be moved for until two assizes have passed, *Evans v. Barnard* (a). In the year 1840, the 26th of May (b) was, in strictness, the first day of Trinity Term, in consequence of the period between the Thursday before and the Wednesday after Easter day having fallen within Easter Term. The 11 Geo. 4, and 1 Wm. 4, c. 70, s. 6, enacts, that Easter Term shall begin on the 15th of April and end on the 8th of May, and that Trinity Term shall begin on the 22nd of May and end on the 12th of June, but if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter day, shall fall within Easter Term, there shall be no sittings in banc, but the Term shall, in such case, be prolonged, and continue for such number of *days of business* as shall be equal to the number of the intervening days before mentioned, exclusive of Easter day; and the commencement of the ensuing Trinity Term shall in such case, be postponed, and its continuance prolonged for an equal number of days of business. But assuming that Trinity Term commenced on the 27th of May, the motion was nevertheless premature, since the issue having been joined in Easter vacation must have reference to the following Term.

(a) *Ante*, vol. 6, p. 367; 3 M. & W. 276.

13th of May, and Trinity Term commenced on Wednesday, the 27th of May.

(b) In the year 1840, Easter Term ended on Wednesday, the

1841.

DOWNES
v.
BOSTOCK.

Whiteman, in support of the rule, contended, that the Term did not commence until the 27th, and that issue must be considered as joined of the preceding Term.

PARKE, B.—The 27th was certainly the first day of Trinity Term, and, therefore, the issue must be considered as joined in Easter vacation. But in that case, the motion is premature, for it has been decided, that issue joined in vacation in a country cause, must be considered as joined in the ensuing Term. The rule must, therefore, be discharged.

ALDERSON, B.—The act expressly says, that Easter Term shall be prolonged by as many days of business as the Court shall omit to sit, by reason of Easter day falling within the Term; Easter Term was, in fact, prolonged five days (*a*), consequently the first day of Trinity Term was the 27th.

Rule discharged, with costs (*b*).

(*a*) The Term ended one day later, in consequence of Sunday intervening. See *Wright v. Lewis*, *ante*, p. 183, where a writ of pone per vadios made returnable on

the 26th of May in that year was set aside.

(*b*) See *Heath v. Boxall*, *ante*, vol. 7, p. 19.

WATKINS v. WAKE.

Debt lies upon a bill of exchange by an indorsee against his immediate indorser.

DEBT on a bill of exchange, by indorsee against his immediate indorser. General Demurrer and Joinder.

White, in support of the demurrer. Debt will not lie against the indorser of a bill of exchange, but the only remedy is by assumpsit. The promise of an indorser is not an absolute undertaking to pay, but a mere collateral engagement to pay, if the acceptor makes default. It cannot then be said, that there was a debt due from the indorser

to the indorsee. *Randall v. Rigby* (a) shews that debt cannot be maintained on a collateral covenant. No case has yet decided that this form of action can be maintained under the present circumstances. *Bishop v. Young* (b) was an action by payee against the maker of a promissory note, and it appeared by the declaration, that the note itself was expressed to be for value received. So in *Priddy v. Henbrey* (c), which was an action by the drawer against the acceptor of a bill, the bill was shewn to have been given for value received in goods. But debt will not lie by indorsee against acceptor of a bill, notwithstanding the latter is primarily liable, *Cloves v. Williams* (d). In *Hatch v. Traves* (e), the action was by payee against maker of a promissory note, and in *Watson v. Kightly* (f), by drawer against acceptor of a bill of exchange; in both instances the party sued was primarily liable, which distinguishes those cases from the present.

1841.
 WATKINS
 v.
 WAKE.

Peacock, in support of the declaration. Debt will lie upon a bill or note, wherever there is a privity of contract between the parties; thus, on a bill payable to the drawer's own order, at the suit of the first indorsee against such drawer, *Stratton v. Hill* (g). The true test is, whether or no there is an existing debt, and on bills of exchange and promissory notes a debt is always implied between the immediate parties. It is clear, that debt will lie by indorsee against the drawer of a bill, *Sand's case* (h); it then necessarily follows, that it may be maintained against the indorser at the suit of his immediate indorsee; for every indorser is, in contemplation of law, a new drawer.

Lord ABINGER, C. B.—The plaintiff is entitled to judg-

(a) 4 M. & W. 130, *ante*, vol. 6, p. 650.

(b) 2 B. & P. 78.

(c) 1 B. & C. 674.

(d) 5 Scott, 68.

(e) 3 P. & D. 408.

(f) *Ib.*

(g) 3 Price, 253; 2 Chit. 126.

(h) 2 Salk. 22.

1841.

WATKINS

v.

WAKE.

ment. The authorities shew that debt will lie against the drawer of a bill, at the suit of his indorsee; and if so, it may be maintained against the indorser by his immediate indorsee, for the promise of the drawer and indorser is, in law, precisely the same.

PARKE, B.—I am of the same opinion. The indorsement admits a debt to be due from the indorser to the indorsee. It is true that the promise of the indorser is not to pay absolutely, but only in default of payment by the acceptor, but upon that event happening, the indorser promises to pay his own debt, and not the debt of the acceptor. Then, the indorser having become liable for his original debt, an action of debt may be maintained against him.

ALDERSON, B.—It appears, on the face of the declaration, that there is a debt between the parties.

Judgment for the Plaintiff.

DELLEVENE v. PERCER.

A count in debt stated that the defendant was indebted to the plaintiff "for goods sold to the defendant, by the plaintiff, at his request," the defendant having demurred specially, the Court set aside the demurrer as frivolous.

A COUNT in debt stated, "that the defendant, on, &c., was indebted to the plaintiff, in 20*l.*, for goods sold and delivered to the defendant by the plaintiff, at his request." The defendant demurred specially, on the ground that the count was ambiguous.

Miller had obtained a rule to shew cause, why the demurrer should not be set aside as frivolous, against which,

Cole shewed cause. The count is not in accordance with the form prescribed by the rule of T. T., 4 Wm. 4 (a). It is well established, that pleadings must not be ambiguous

or doubtful in meaning, *Stephen on Pleading* (a). According to strict grammatical construction, the pronoun "his" would refer to the last antecedent, and then the count would be for goods sold and delivered to the defendant, at the plaintiff's request. [Lord *Abinger*, C. B.—It is ambiguous in one sense, but it is explained by the context.] The same might be said in all cases of ambiguity; it is seldom that a doubtful pleading cannot be made certain by inference. [*Alderson*, B.—One half of the English language is interpreted by the context. *Parke*, B.—Was not this point decided in *Spyer v. Thelwall* (b)?] That was a declaration on a bill of exchange, drawn by N., on the defendant, whereby he required the defendant to pay to his order the sum therein mentioned; but there it was clear that the drawer would not have made the bill payable to the acceptor's order.

1841.
 DELLEVENE
 v.
 PERCER.

PER CURIAM.—The count is certain to a common intent, and sufficient. The rule must be absolute.

Miller, contra, was not heard.

Rule absolute.

(a) 2 Ed. 421.

(b) 2 C., M. & R. 692.

EDEN v. BRETTON.

THIS cause was tried under a writ of trial before the judge of the Borough Court of record of Cambridge.

Martin had obtained a rule nisi, for setting aside the verdict, and for a new trial. The rule was drawn up without an affidavit, verifying the judge's notes, in consequence of the judge having refused to let the defendant have a copy of his notes. He had, however, forwarded them to Mr. Baron *Rolfe*.

Motions respecting causes tried by writ of trial must be made on affidavit, verifying the judge's notes, as well where the trial took place, before the judge of an inferior Court of Record, as before the sheriff.

1841.

EDEN
v.
BRETTON.

Hance, on shewing cause, objected that the rule was not drawn up on an affidavit, verifying the judge's notes, and referred to the resolutions of the judges, as reported in 4 *M. & Scott*, 484 (a).

PARKE, B.—When this rule was obtained, the Court ordered it to be drawn up on reading the judge's notes (b), and not on an affidavit verifying the notes, under an erroneous impression that the practice, with respect to motions of this description, was confined to cases of trial before sheriffs. It applies, however, equally to trials before a judge of an inferior Court of record under a writ of trial. As the error is the act of the Court, the objection ought not to be pressed.

Hance then shewed cause on the merits.

(a) On the 15th of April, 1834, it was stated by *Tindal*, C. J., "That the judges had come to a resolution, that upon all motions respecting causes tried before sheriffs or judges of inferior Courts of Record, pursuant to the statute, 3 & 4 Wm. 4, c. 42, ss. 17, 18, the party making the application to the Court above, must produce an examined copy of the notes of the sheriff, or his deputy, or of the judge who tried the cause, together with an affidavit, verifying such to be a true copy; and also, in cases where

no counsel has been retained to conduct the cause or defence, in the Court below, an affidavit, setting forth the cause or nature of the application, and that all motions to set aside verdicts obtained in such Courts should come on for hearing, as motions in the ordinary course, and not be set down in the new trial paper."

(b) The rule had not been drawn up on reading the judge's notes, but on reading an affidavit stating the facts proved at the trial. See *Lawlor v. Clements*, ante, vol. 8, p. 688.

GRICE v. LEVER.

The plea of liberum tenementum, admits the plain-

TRESPASS, quare clausum fregit. Plea, liberum tenementum. At the trial before *Coleridge*, J., at the last Wilts

tiff's possession, and renders it incumbent on the defendant to prove title, either by deed or by shewing twenty years' actual possession.

assizes, the defendant, in support of his plea, proved the exercise of acts of ownership over the locus in quo for a period of seventeen years. The plaintiff proved, that at a prior period, and within twenty years, the freehold was in a person of the name of Barrow. Neither the plaintiff nor the defendant deduced any title from Barrow. The learned judge told the jury, that, in his opinion, the acts of ownership proved by the defendant made out a *primâ facie* case in support of the plea. A verdict was then found for the defendant.

1841.

GRICE

v.

LEVER.

Bompas, Serjt., obtained a rule nisi, to set aside the verdict and for a new trial, on the ground of misdirection.

Crowder and *Butt* shewed cause, and contended, that the question was properly left to the jury. It was not necessary for the defendant to produce his title-deeds, the acts of ownership made out a sufficient *primâ facie* title.

Bompas, Serjt., in support of the rule. By the plea of *liberum tenementum*, the defendant admits the possession of the plaintiff, and undertakes to do away with the presumption arising from such possession, by shewing title in himself. That may be done either by proving his title by deed, or by shewing acts of ownership extending over a period of twenty years; here, the defendant has failed in proving any title. He has attempted to do so, by shewing acts of ownership for a period of seventeen years, but the plaintiff rebuts that case, by shewing that the freehold was in a third party within the twenty years. The defendant having by his plea admitted the plaintiff's possession, no presumption of title in defendant can arise, unless twenty years' actual possession be proved, *Doe d. Harding v. Cooke* (a).

Cur. adv. vult.

(a) 7 Bing. 346.

1841.

GRICE

v.

LEVER.

On a subsequent day the judgment of the Court was delivered by

PARKE, B.—(After stating the facts). By the plea of liberum tenementum, the defendant admits that the plaintiff is in possession, and that he is himself, *primâ facie*, a wrong doer, but he undertakes to shew a title in himself, which shall do away with the presumption arising from the plaintiff's possession. This must be done, either by shewing title by deed, in the usual way, or by proving a possessory title for twenty years. Here, the defendant only proves acts of ownership for seventeen years, and does not connect them with any prior title ; it, therefore, amounts to nothing more than a longer against a shorter possession, a mere priority of possession, and for a period insufficient to confer any title, except against a mere wrong-doer (*a*). We think, therefore, that there was a misdirection, and this rule must be absolute.

ALDERSON, GURNEY, and ROLFE, Bs., concurred.

Rule absolute.

(*a*) *Allen v. Rivington*, 2 Wms. Saund. 110 (*a*) n. (*a*).

PALMER and Another v. GODEN and Others.

- COVENANT for rent by the trustees of the Honiton turnpike-road. The declaration set out a covenant contained in the lease on the part of Goden, as lessee of the tolls, and the other defendants, as his sureties, for the payment of the rent reserved by certain monthly payments, and alleged, as a breach, the non-payment of five such monthly payments.

To covenant for rent against the lessee of tolls the defendant pleaded, that before the rent became due, the plaintiff entered upon the tolls, and then ejected expelled, put out, and removed the defendant from possession thereof : Replication, that plaintiff did not *enter*, eject, expel, &c.

Held, that the traverse of the entry was bad on special demurrer.

Plea, as to the sum of, &c., parcel, &c., actio non, because, before the said sum of, &c., parcel, &c., became due, and after the making of the indenture, to wit, on, &c., the said trustees in the said indenture and in the declaration mentioned, with force and arms, &c., entered into and upon a certain part or portion of the said demised tolls, that is to say, all those tolls (setting out certain of the tolls), and then ejected, expelled, put out, and removed the said defendant, Robert Goden, from the possession thereof, and kept and continued him so ejected, expelled, put out, and removed thence hitherto. Verification.

Replication, that the said trustees did not enter into or upon the said part or portion of the said demised tolls, or eject, expel, put out, or remove the defendant, Robert Goden, from the possession thereof, modo et formâ.

Special demurrer, assigning for cause, that the replication puts in issue the entry, which is an immaterial fact, and also that the replication is double.

Cowling, in support of the demurrer. The replication should have denied that the plaintiff "ejected and expelled" in manner and form, *Hodgskin v. Queenborough* (a), *Bushell v. Lechmore* (b). The eviction is the only material part of the plea, and it may take place without an entry. In *Vin. Ab. tit. "Disseisin,"* it is said, "If a man hath a house, and locks it and departs, and another comes to his house and takes the key of the door into his hand, and says, that he claims the house to himself in fee, without any entry into the house, this is a disseisin of the house." So "if a man that has a right to enter into lands, in coming towards the land is disturbed from entering, this is a disseisin." The replication seeks to put in issue a totally immaterial fact. The case resembles the traverse of a day, where time is not material, *Hawe v. Planner* (c).

Crowder, in support of the replication. The allegation

(a) Willes, 129.

(c) 1 Wms. Saund. 9 b.

(b) 1 Ld. Raym. 369.

1841.

PALMER
and Another
v.
GODEN
and Others.

1841.
 PALMER
 and Another
 v.
 GODEN
 and Others.

of entry is totally immaterial, and the defendants cannot be prejudiced by its being traversed. This is like the case of *Webb v. Weatherly* (a), in which the plaintiff was allowed to traverse both a payment in satisfaction and a receipt in satisfaction. [*Parke, B.*—There must have been a payment in satisfaction to constitute a receipt in satisfaction, the one proposition was involved in the other.] So here, the entry and eviction form but one entire proposition.

PARKE, B.—The entry is quite immaterial, and should not have been traversed; you had better amend.

Crowder consented to amend.

(a) 1 Bing. N. C. 502.

IBBOTSON v. CHANDLER.

A sheriff having levied on the goods of the defendant, received notice of his bankruptcy, and of a claim by the provisional assignee, "or of any other persons who might be appointed assignees." After the assignees were appointed, the sheriff obtained an interpleader rule, calling on the provisional assignee only to appear.

Held, per Rolfe, B., that the assignees were entitled to appear on that rule.

THIS was an interpleader rule, obtained by the lord of the manor of Wakefield, who had the execution of writs within the manor. The execution was levied on the 13th of November, and on the 19th, a fiat in bankruptcy was issued against the defendant. A person of the name of Cowell was appointed provisional assignee, and on the same day, the lord of the manor received a notice of claim on behalf of Cowell, "or any other persons who might be appointed assignees." On the 4th of December, assignees were appointed, and on the 16th of January, the present rule was obtained, which called on Cowell to appear and state his claim.

Addison, for the execution creditor. Cowell, the provisional assignee, has no right to appear, since his interest is entirely superseded by the appointment of assignees. The assignees cannot appear, for the rule does not call upon

them. No person has a right to be heard against the rule, unless he is called upon by the rule, though he is, in fact, a claimant; and if he is called upon in one character, he cannot appear in another, *Clarke v. Lord* (a). If the lord of the manor wished to protect himself by making the assignees defendants in his stead, he ought to have made them parties to the rule.

1841.
 IBBOTSON
 v.
 CHANDLER.

Cowling, for Cowell and the assignees. The fact of Cowell's interest being determined, does not preclude him from appearing. In an action of trover, it would be no answer to say, that the plaintiff, after the conversion, parted with his interest in the goods. In *Clarke v. Lord*, the fiat had been superseded; here, the assignees, when appointed, stand in the same situation as Cowell.

Wightman, appeared for the lord of the manor.

ROLFE, B.—I think the lord of the manor is entitled to the rule. There must be an issue between the execution creditor and the assignees.

Rule accordingly.

(a) *Ante*, vol. 2, p. 55.

MARSHALL v. PARSONS.

IN this case, the plaintiff had given a peremptory undertaking to try the cause, which was accordingly entered, but on being called on, the record was withdrawn, in consequence of the defendant's refusal to admit the execution of an agreement, which the plaintiff could not prove, by reason of his inability to procure the attendance of the attesting witness. A rule had been granted to enlarge the peremptory undertaking, on payment of the costs of the day, and the costs of that motion. On taxation, the Master

On taxation of costs, if doubt exists, as to whether a witness was material and necessary, and the Master allows the charge upon the certificate of counsel in the cause, the Court will not review the taxation.

1841.
 MARSHALL
 v.
 PARSONS.

had allowed 16*l*. 2*s*. for the expenses of the defendant's attorney, who had been subpoenaed for the purpose of explaining an agreement which he had drawn.

E. V. Williams now moved for a rule to review the Master's taxation, on the ground, that the attorney was not a material and necessary witness.

PARKE, B., (After consulting with the Master.)—The Master says, that in consequence of a doubt which he entertained as to this witness being material and necessary, he refused to allow the charge in question, unless he was satisfied as to the fact, by the certificate of counsel in the cause. In this respect he has followed the usual course, which is, in doubtful cases, to demand a certificate, and to allow or disallow items accordingly. Here, the counsel in the cause has certified that the witness was material and necessary, and there is no reason for interfering with the decision of the Master.

ALDERSON, GURNEY, and ROLFE, Bs., concurred.

Rule refused.

JONES, Administratrix of R. JONES v. WILLIAMS.

A declaration stated in consideration that R. J., at the request of de-

fendant, would, by writing obligatory, acknowledge himself bound to W. J., in the penal sum of 600*l*., to be paid to W. J., the defendant would indemnify R. J., his executors, &c., from any loss by reason of his executing the said writing obligatory; it then alleged the execution of the bond by R. J., his death, and grant of administration to plaintiff, and stated, as a breach, that plaintiff, as administratrix, was called upon, and forced, and obliged to pay the sum secured by the writing obligatory, and also a further sum for costs, &c.

Plea, that plaintiff was not called upon, or forced or obliged to pay the said monies, nor was the plaintiff damnified modo et formâ. At the trial, it appeared that the bond was conditioned for payment, *after six months' notice*, and there was no evidence that notice had been given to plaintiff before payment.

Held, that the objection as to want of notice could not be taken on these pleadings, and that in order to raise it, the defendant should have set out the condition of the bond in the plea, and averred that no notice had been given.

the defendant, would, by his writing obligatory, sealed with his seal, acknowledge himself firmly bound to one William Jones, in the penal sum of 600*l.*, to be paid to the said William Jones, or his certain attorney, executors, administrators, or assigns, he, the defendant, would save harmless, and indemnify the said R. Jones, his executors and administrators, from any loss or damage by reason of his making and executing the said writing obligatory; that the said Jones, confiding in the promise of the defendant, did seal, and as his act and deed deliver, to the said William Jones, a certain writing obligatory, and did thereby and therein acknowledge himself to be bound to the said William Jones, his executors, administrators, and assigns; and afterwards, to wit, on, &c., the said Richard Jones died, (the declaration then stated the grant of administration to the plaintiff): and the plaintiff, as administratrix, became liable to pay and satisfy the said writing obligatory to the said William Jones, of which the defendant then had notice; yet the defendant, not regarding his said promise, did not nor would indemnify or save harmless the plaintiff, as such administratrix, from loss and damage, by reason of the making and executing of the said writing obligatory, but wholly neglected and refused so to do, by means, and in consequence whereof, the plaintiff, as administratrix as aforesaid, was called upon, and forced, and obliged to pay, and did then pay, to the said William Jones, the sum payable and secured by the said writing obligatory; and also a further sum, as and for costs and expenses of a certain action, commenced and prosecuted by the said William Jones against the plaintiff, as administratrix as aforesaid, in Her Majesty's Court of Exchequer, at Westminster, upon and in respect of the said writing obligatory, and for enforcing payment of the money secured thereby; and also she, the plaintiff, as administratrix as aforesaid, by means of the premises, was forced and obliged to incur, and did incur, certain costs, charges, and expenses in and about the

1841.
JONES,
Administratrix
of R. JONES
v.
WILLIAMS.

1841.
JONES,
Administratrix
of R. JONES
v.
WILLIAMS.

defence of the said action so commenced and prosecuted against her as aforesaid, and in and about the settling and putting an end to the said action as aforesaid. The defendant pleaded, first, the general issue; secondly, that the plaintiff, as administratrix as aforesaid, was not called upon, or forced, or obliged to pay, nor did she pay, to the said William Jones, the said moneys in the said first count in that behalf mentioned; nor was the plaintiff, as administratrix as aforesaid, damnified, as in the said first count mentioned, in manner and form, &c. At the trial before Lord *Denman*, C. J., at the last Summer Assizes for the county of Merioneth, the plaintiff gave in evidence the bond above referred to, the condition of which was for the payment of 300*l.*, with lawful interest for the same, *at or before the expiration of six months' notice* to pay the same. It was objected, on the part of the defendant, that it was not averred or proved that the plaintiff had paid after six months' notice, according to the condition of the bond. The learned judge directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for the amount claimed. A rule having been obtained accordingly,

Jervis, *Cowling*, and *Yardley* now shewed cause. The question is, whether the liability and the demand are correctly alleged in the declaration? And if so, whether they are sufficiently traversed by the plea? The condition of the bond requires the money to be paid at or before the expiration of six months' notice. The declaration alleges generally, that the plaintiff "was forced and obliged to pay;" if that allegation means that the plaintiff was forced and obliged to pay according to the terms of the condition, then the payment after notice is put in issue by the plea. If the bond and condition had been set out on the record, it is clear that notice must have been averred. [Lord *Abinger*, C. B.—The proper mode of taking advantage of

the want of notice, would have been to set out the condition of the bond in the plea, therein shewing that the plaintiff was only liable after notice, and then to aver that no such notice had been given.] The allegation in the declaration, that the plaintiff was "forced and obliged" to pay, means, that he was compelled, according to the terms of the condition, and thereon it was incumbent on him to prove notice. The case is analogous to bills of exchange. [Lord *Abinger*, C. B.—The distinction is, that with respect to bills of exchange, if notice be not properly given, the right of action is gone altogether; but in this case, the action itself is notice.] This is a promise to save harmless, and if the present plaintiff could have protected himself from the action on the bond, he has no right to call on the defendant to indemnify him. In *Shep. Touch. (a)*, it is said, "but if the obligor be sued unjustly, either because he is sued before the money is due or otherwise, and he suffer himself to be unjustly vexed thereupon, and doth not take advantage of it, it seems this is no breach of the condition of the bond to save harmless."

1841.
 JONES,
 Administratrix
 of R. JONES
 v.
 WILLIAMS.

R. Alexander, Welsby, and Tomlinson, contra, were stopped by the Court.

LORD ABINGER, C. B.—The rule must be absolute. If the condition of the bond had been set out in the plea, and the want of notice properly averred and put in issue, the defendant might have been protected from the costs of the former action against the intestate; but that is the utmost advantage he could have derived from it. The bringing the action was of itself notice.

PARKE, B.—I have some doubt whether the plaintiff might not have been justified in paying without notice, to save the penalty. If the defendant wished to protect himself

(a) P. 390.

1841.
 JONES,
 Administratrix
 of R. JONES
 v.
 WILLIAMS.

from the costs of the former action, of which he had notice, he should have come in and defended it, *Duffield v. Scott* (a). A verdict must, therefore, be entered for the amount of the claim.

ALDERSON and GURNEY, Bs., concurred.

Rule absolute.

(a) 3 T. R. 374.

EVANS and Another v. MANERS.

A sheriff is only entitled to poundage upon the real debt, *bonâ fide* due, therefore, where the plaintiff took a debtor in execution, by virtue of a writ of *ca. sa.*, indorsed, by mistake, for a larger sum than that really due, and the mistake in the indorsement, was afterwards amended by a judge's order. *Held*, that the sheriff's claim to poundage must be regulated accordingly.

Seemle, In an action against a sheriff for an escape, he stands in the same situation as the original defendant, and may reduce his liability by any equities which the defendant would have had against the plaintiff. *Per Abinger, C. B. Parke, B.*, dubitante.

DEBT for sheriff's poundage. The declaration stated, that after the making of a certain act of Parliament, made and passed in the reign of our Lady Elizabeth, late Queen of England, entitled "An act to prevent extortion in sheriffs, under-sheriffs, and bailiffs of franchises or liberties, in cases of execution." And before the commencement of this suit, to wit, on, &c., the now defendant sued and prosecuted out of the Court of our Lady the Queen, before the barons of her Exchequer at Westminster, &c., a certain writ of our Lady the Queen, called a *capias ad satisfaciendum*, directed to the sheriffs of London, whereby the said sheriffs of London were commanded to take John Reckless, the younger, if he should be found in their bailiwick, and him safely keep, so that they should have his body before the barons of our Lady the Queen's Exchequer at Westminster immediately after the execution thereof, to satisfy the now defendant, as well as a certain debt of 1724*l.* 5*s.* 10*d.* which the said now defendant, then lately in the borough Court of Liverpool, by the judgment of the said Court, recovered against the said John Reckless, as also 4*l.* 16*s.* 8*d.* which were adjudged to the said now defendant in the said

equities which the defendant would have had against the plaintiff. *Per Abinger, C. B. Parke, B.*, dubitante.

Court for his damages which he had obtained, as well on occasion of the detaining the said debt as for his own costs and charges by him about his suit in that behalf expended ; whereof the said John Reckless was convicted, as appeared to our said Lady the Queen, by the certificate of the register of the said borough Court of Liverpool, and on which judgment, in pursuance of the statute in such a case made and provided, it was, by an order dated the 7th day of May then instant, made by Sir *Robert Mounsey Rolfe*, one of the barons of our Lady the Queen's said Court of Exchequer, ordered that a writ or writs of execution might issue out of our said Lady the Queen's Court of Exchequer of Pleas for the amount of such judgment, with costs of and occasioned by the application for the said order, to be taxed by the Master of the said Court of Exchequer, together with the costs of execution, and which said costs of and occasioned by the said application for the said order, were on, &c., taxed, and allowed by the said Court, before the barons of our said Lady the Queen's Exchequer at Westminster, at the sum of 3*l*. 7*s*. ; and further to satisfy the said now defendant, the said sum of 3*l*. 7*s*., together with interest upon the several sums of 1724*l*. 5*s*. 10*d*., 4*l*. 16*s*. 8*d*., and 3*l*. 7*s*., at the rate of 4*l*. per cent. per annum, from, &c., to have there then that writ. And afterwards, and before the delivery of the said writ to the said plaintiffs, as hereinafter mentioned, to wit, on, &c., the said defendant, by a certain indorsement on the said writ, directed and marked on the back of the said writ, that the said sheriffs should take 1732*l*. 9*s*. 6*d*. and interest thereon, from, &c., till paid. That the said writ so indorsed as aforesaid, afterwards, and before the commencement of this suit, to wit, on, &c., was delivered to the said plaintiffs, who then, and until, and after the arrest of the said John Reckless, were sheriffs of the city of London, to be executed in due form of law. And the plaintiffs being such sheriffs as aforesaid, afterwards and after the delivery of the said writ to them as aforesaid, and during the continuance of their said shrievalty, and before

1841.

EVANS
and Another
v.
MANERS.

1841.
 EVANS
 and Another
 v.
 MANERS.

the commencement of this suit, to wit, on, &c., in, &c., and within their bailiwick, as such sheriffs as aforesaid. And by virtue and in pursuance of the command of the said writ, they arrested the said John Reckless by his body, and had and detained him in their custody, in due form of law, in execution for the debt and damages aforesaid, according to the exigency of the said writ, and the said indorsement so made thereon as aforesaid, whereby and by force of the statute in such case made and provided, the said now defendant became and was liable to pay to the said plaintiffs, and an action had accrued to the said plaintiffs as such sheriffs as aforesaid, to demand and have of the said now defendant, the sum of 45*l*. 16*s.*, that is to say, 1*s.* of and for every twenty shillings of 100*l.*, part of the debt and damages aforesaid, and so marked on the back of the said writ as aforesaid, and 6*d.* for every 1*l.* of the residue of the said sum so marked on the back of the said writ as aforesaid, being over and above the said sum of 100*l.* Breach, that defendant hath not paid the same.

Plea, As to the cause of action in the declaration mentioned, except as to the sum of 6*l*. 9*s.* 6*d.*, parcel of the money thereby demanded, the defendant says, that the said judgment recovered by the now defendant in the borough Court of Liverpool, mentioned in the writ of *capias ad satisfaciendum* in the declaration in this cause, particularly set forth, was so recovered by the now defendant against the said John Reckless, upon and by virtue of an order of the said borough court of Liverpool, made by the said Court, to wit, on, &c., and whereby upon hearing the attorney for the now defendant and the said John Reckless in person, and by consent, it was ordered by the said borough Court, that all proceedings in that action should be stayed, and that the plaintiff therein should be at liberty to sign final judgment for the sum of 1724*l*. 5*s.* 10*d.* for the purpose of securing the due and punctual payment of the following promissory notes (the plea then set out these notes, one of which was for 150*l.* and two others for 25*l.* each). And it was

also thereby ordered, that any execution to be issued by virtue of that rule, should be merely to secure the amount of such of the said promissory notes as should be due at the time of issuing such execution, together with the costs of judgment, officers' fees, and all other incidental charges thereon; nevertheless, in case of the bankruptcy or insolvency of the defendant in that action, before payment of the said notes, or any or either of them, the plaintiff therein was to be at liberty to prove, under the estate of the defendant in that action for the sum of 1724*l.* 5*s.* 10*d.*, or so much thereof as should be due at the time of such bankruptcy or insolvency, the said several promissory notes having been accepted by the plaintiff in that action, from the defendant therein, as a composition on the said sum of 1724*l.* 5*s.* 10*d.*, as by the said order, remaining in the said Borough Court of Liverpool, reference being thereunto had, will fully appear; that at the time of the making of the said order of the said Sir *Robert Mounsey Rolfe*, in the said declaration mentioned, and also of the issuing of the said writ of *capias ad satisfaciendum* in the said declaration mentioned, the real debt, *bonâ fide* due to the now defendant, and for which he, the now defendant, was entitled to issue execution upon the said judgment, amounted to the sum of 150*l.* 5*s.* 10*d.*, and no more, together with 4*l.* 16*s.* 8*d.*, being the costs of the said judgment, and also the costs of, and occasioned by the application for the said order, with the costs of execution, which said costs of and occasioned by the said application for the said order were, to wit, on, &c., in the said declaration in that behalf mentioned, taxed and allowed at the sum of 3*l.* 7*s.*, as in the declaration mentioned; but the now defendant, in fact, saith, that after the issuing of the said writ of execution in the said declaration mentioned, and before the delivery thereof to the plaintiffs, as such sheriffs, as in the said declaration mentioned, to wit, on, &c., in the declaration in that behalf mentioned, the now defendant, by mistake and misapprehension, caused the said indorsement in the said declaration mentioned, to be made

1841.
 EVANS
 and Another
 v.
 MANERS.

1841.
EVANS
and Another
v.
MANERS.

on the said writ, whereby it was directed that the said sheriffs should take 1732*l.* 9*s.* 6*d.*, and interest thereon, from, &c., till paid, whereas the now defendant should and ought, by the indorsement, to have directed the sheriffs to take 158*l.* 9*s.* 6*d.*, and interest thereon, from, &c., till paid, and no more; and the now defendant further says, that immediately after the arrest of the said John Reckless by the sheriffs, under and by virtue of the said writ of execution, as in the said declaration mentioned, and whilst the said John Reckless was in the custody of the said sheriffs, under and by virtue of the said writ, the said mistake in the said indorsement was discovered by the now defendant, whereupon the now defendant then caused such proceedings to be taken by virtue of the said execution, in the said action, before the said Sir *Robert Mounsey Rolfe*, then being one of the barons of Her Majesty's Exchequer, that it was afterwards, to wit, on, &c., in due manner, ordered by the said Sir *Robert Mounsey Rolfe*, that the now defendant should be at liberty to amend the said indorsement upon the said writ of *capias ad satisfaciendum*, by reducing the sum of 1732*l.* 9*s.* 6*d.* indorsed thereon as aforesaid, to 158*l.* 9*s.* 6*d.*, as by the said order, reference being thereunto had, will more fully appear, which said last mentioned order is still in full force and effect, and hath not been in any manner reversed, annulled, or vacated; and the now defendant further saith, that afterwards, to wit, on, &c., he, the now defendant, caused the said order to be in due manner served upon the said sheriffs, and also then caused the said indorsement on the said writ to be amended; and the same then was amended, under and by virtue of the said last mentioned order, that is to say, by reducing the sum of 1732*l.* 9*s.* 6*d.*, indorsed on the said writ of execution, to the said sum of 158*l.* 9*s.* 6*d.*; and thereupon, by the said amended indorsement on the said writ of execution, it was directed and marked on the back of the said writ, that the said sheriffs should take 158*l.* 9*s.* 6*d.*, and interest thereon, from, &c., until paid, which said sum of 158*l.* 9*s.* 6*d.* was

the real debt, bonâ fide due and claimed by the now defendant, against the said John Reckless, under and by virtue of the said execution; and the now defendant further saith, that the amendment was so made in the said indorsement on the said writ as aforesaid, to wit, on, &c., last aforesaid, during the continuance of the shrievalty of the now plaintiffs, and before the commencement of this suit, and whilst the said John Reckless was in the custody of the now plaintiffs, as such sheriffs as aforesaid, under and by virtue of the said writ; and that thereupon and thereby the now plaintiffs, as such sheriffs as aforesaid, detained the said John Reckless in their custody, under and by virtue of the said writ, in execution, for the monies so mentioned in the said amended indorsement on the said writ, and for no other or greater sum of money; and the defendant, in fact, saith, that the plaintiffs, so being such sheriffs as aforesaid, were not prejudiced by the said mistake, so committed in the said indorsement as aforesaid, by reason of which said several premises, the now defendant became and was liable to pay the plaintiffs, by force of the statute in such case made and provided, poundage for the said monies so mentioned in the said amended indorsement, and thereby marked and specified on the back of the said writ, that is to say, the sum of 158*l.* 9*s.* 6*d.*, and for no other or greater sum, and which said poundage for the said last mentioned monies amounted to a certain sum of money, to wit, the sum of 6*l.* 9*s.* 6*d.*, and was and is the sum of 6*l.* 9*s.* 6*d.* in the introductory part of this plea mentioned. Verification.

General demurrer and joinder. The point marked for argument on the part of the plaintiff, was, that the plea did not disclose any defence to the claim of poundage on the whole sum marked on the writ.

W. H. Watson, in support of the demurrer. The sheriffs are entitled to poundage upon the sum originally indorsed upon the writ. In an action for an escape, the judgment

1841.
 EVANS
 and Another
 v.
 MANERS.

1841.

EVANS
and Another
v.
MANERS.

and indorsement would be evidence to fix the sheriff in that amount of damages. By the 29 Eliz. c. 4, s. 1, sheriffs are enabled to take one shilling for every twenty shillings where the sum does not exceed 100*l.*, and sixpence for every twenty shillings above the sum of 100*l.*, "that they shall so levy or extend and deliver in execution, or take the body in execution for." Supposing the law depended upon that statute, sheriffs would be clearly entitled to poundage upon the whole sum for which the party was taken in execution, *Com. Dig.* tit. "*Viscount*," (F 1). Then, the 3 Geo. 1, c. 15, s. 17, after reciting "that it often happens that small sums only are due on judgments, &c., and nevertheless, upon executing writs of *ca. sa.*, the sheriff demands and takes for his fees, poundage for the whole money for which such judgments, &c., are entered," enacts "that poundage shall in no case be demanded or taken upon executing any writ of *ca. sa.*, or in charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff amounteth unto, which sum the plaintiff shall be and is hereby obliged to mark and specify on the back of such writ, before the same be delivered to the sheriff to be executed." The sheriff cannot be cognizant of the sum really and *bonâ fide* due; but it is the plaintiff's duty to indorse that amount on the writ, and the sheriff is bound to levy accordingly. It is no answer to say that a mistake was made in the indorsement; the sheriff has been called upon to perform his duty, and the party is bound to pay his fees. *Earle v. Plummer* (a), expressly decided, that if an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. If a sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before the goods are sold, *Alchin v. Wells* (b). If, after levy, the judgment and execution are set aside for irregularity, and

(a) Salk. 332.

(b) 5 T. R. 470.

the money ordered to be returned, the sheriff is nevertheless entitled to his poundage, *Rawstorne v. Wilkinson* (a). Here, the alteration in the indorsement amounted to a setting aside of the execution pro tanto. As the sheriff has incurred the responsibility of a levy to the larger amount, he is entitled to remuneration upon the whole sum indorsed on the writ.

1841.
 EVANS
 and Another
 v.
 MANERS.

Martin, contra. The right of the sheriff to poundage does not arise from contract, but depends upon the statute. It is conceded, that if the sheriff would have been responsible, in the event of an escape to the extent of 1732*l.* 9*s.* 6*d.*, he is entitled to poundage upon that sum; but it is submitted that he would only be liable for such damage as the plaintiff could prove he had sustained. At common law, the only remedy for an escape was by action on the case, but the statutes of Westminster 2, 13 Ed. 1, c. 11, and 1 Rich. 2, c. 12, rendered the sheriff liable to an action of debt (b), but in that form of action the plaintiff can only recover the debt really and bonâ fide due. There is no authority to shew that a sheriff is entitled to poundage upon a sum indorsed by mistake on the writ, all that the authorities establish is, that the sheriff is liable for the whole debt and costs in the original action, *Bonafous v. Walker* (c). *Earle v. Plummer* was the case of an irregular writ, and there, the sheriff would be entitled to his poundage, because he would be liable, in the event of an escape, unless the writ was set aside for irregularity. It would be different with respect to a void writ, which resembles the present case. The same may be said in *Alchin v. Wells*. In *Rawstorne v. Wilkinson*, the judgment and execution were set aside for irregularity, but until they were set aside, the sheriff's responsibility remained, and it was just that he should be paid his remuneration. But in the present case, the sheriff

(a) 4 Mau. & S. 256.

(c) 2 T. R. 126.

(b) 1 Wms. Saund. 218, n. (5).

1841.
 EVANS
 and Another
 v.
 MANERS.

never incurred any responsibility beyond 158*l* 9*s*. 6*d*. The 3 Geo. 1, c. 15, s. 17, which limits the sheriff's right to poundage to the real debt, bonâ fide due, is conclusive in favour of the defendant. The recital shews that the object of the legislature was to prevent sheriffs claiming poundage upon the amount of the judgment, when a small sum only was due. In the case of judgment signed for the penalty of a bond, conditioned for the payment of a smaller sum, the sheriff is not entitled to poundage, upon the amount of the penalty, but only upon the sum really due. [*Parke, B.*—The statute requires the plaintiff to mark on the back of the writ the real debt, bonâ fide due, and renders the sheriff liable for extortion, if he take poundage upon more than that sum, then what is to guide the sheriff in the amount, which he is to receive, but the indorsement; according to your argument, he would, in this case, be liable for extortion?] There is a distinction between the case of a sheriff insisting upon a demand to which he is not entitled, and that of a party seeking to make the sheriff liable for extortion, by reason of a mistake in the indorsement. [*Parke, B.*—The meaning of the statute is, that the amount to be paid to the sheriff is to be measured by the sum really and bonâ fide due: the sheriff can only know what is due by the indorsement. Lord *Abinger, C. B.*—If by mistake a larger sum is indorsed on the writ than that for which judgment is obtained, and the party, after being taken in execution, escapes, in an action against the sheriff, the plaintiff could not recover more than the amount of the judgment: or suppose the judgment to be entered for a wrong sum, and execution to issue for that amount, and afterwards the party should apply to the Court, to correct the error, and reduce the amount, in an action against the sheriff for an escape, he would only be liable for the sum really due.] When the statute makes the indorsement evidence of the sum really and bonâ fide due, it contemplates that the proceedings are regular.

1841.

EVANS
and Another
v.
MANERS.

Watson, in reply. The sheriff has no means of examining the correctness of the judgment, or of the indorsement, and is, therefore, entitled to his poundage upon the sum recovered and directed to be levied. If, indeed, the sum indorsed on the writ is more than the amount of the judgment, he would be entitled to poundage upon the amount of the judgment only; but, in the present case, there is a judgment for the whole amount indorsed on the writ. The sheriff was bound to execute the writ according to its terms, and the alteration of the indorsement was a fraud upon him. If the defendant had been insolvent, and had escaped, the sheriff might have been liable for the whole amount. [Lord *Abinger*, C. B.—Supposing judgment signed for the penalty of a bond, and the writ also indorsed to levy the amount of the penalty, could not the sheriff, in an action for an escape, shew that the bond was conditioned for the payment of a smaller sum?] The sheriff would not be apprised of that fact, which would be altogether in the breast of the plaintiff. The sheriff could not come to the Court to alter the indorsement by the judgment, which would be conclusive, until set aside by parties or privies. In an action for an escape, the declaration sets out the amount of the judgment, and the writ delivered to the sheriff, and if the judgment and writ correspond with the declaration, they would be conclusive against him.

LORD ABINGER, C. B.—I am disposed to think, that where the sheriff is charged in debt for an escape, he stands in the same situation as the defendant in the action; and if so, he is entitled to all the equities which the latter would have had against the plaintiff, and may shew the real merits of the case, and to what extent the defendant was liable. Then his right to poundage is to be measured by his liability. The Court, however, will take time to consider.

PARKE, B.—I have some difficulty in saying that in an

1841.
EVANS
and Another
v.
MANERS.

action for an escape, the plaintiff is not entitled to recover the whole amount of the judgment. No doubt the Court would exercise an equitable jurisdiction over the matter, and the sheriff might shew that part of the debt had been paid, but that is entirely a collateral proceeding.

Cur. adv. vult.

Lord ABINGER, C. B.—We have considered this case, and are of opinion that the sheriff is not entitled to the poundage on the sum originally indorsed upon the ca. sa. It appears, that the indorsement on the writ was, by mistake, of a greater sum than the amount really due; and the plaintiffs claim poundage in respect of the sum so indorsed. Now, by the statute, 3 Geo. 1, c. 15, s. 17, it is enacted, “that poundage shall, in no case, be demanded or taken upon executing of any writ of *capias ad satisfaciendum*, or upon charging any person in execution, by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff amounteth unto, which sum the plaintiff shall be, and is hereby obliged to mark and specify on the back of such writ before the same be delivered to the sheriff to be executed.” The claim of the sheriff for poundage is plainly limited to an amount calculated with reference to the sum really due, and although the amount actually indorsed, may, *primâ facie*, be the basis of that calculation, yet if an indorsement be made by mistake, and that mistake be corrected, the sheriff’s claim must be regulated accordingly.

Judgment for Defendant.

1841.

SNEEZUM v. MARSHALL.

THIS was an action for not making out a good title, under an agreement for the sale of a public house. On the trial before Lord *Abinger*, C. B., it appeared, that the premises were part of considerable property, held under one lease, granted by the late Lord Somers, and that the property so leased had been subdivided and underlet. The covenants in the original lease extended over all the property, and the original lease contained a proviso for re-entry upon breach of any of the covenants. The under-leases were subject to the covenants and provisoes contained in the original lease. The agreement on which the action was brought, was stamped with a 1*l*. stamp, and stated, that the sale was subject to the covenants set forth "in a draft of a lease delivered this day." If the words of the covenant so referred to, were not to be reckoned in calculating the amount of stamp duty, the 1*l*. stamp would be sufficient, but if otherwise a higher stamp would be requisite, as the agreement and covenant together exceeded 1080 words. It was objected, on the part of the defendant, that the covenants referred to, must be considered as embodied in the agreement, and that, therefore, the stamp was insufficient. The Lord Chief Baron allowed the agreement to be given in evidence, and a verdict was found for the plaintiff, with liberty to move to enter a nonsuit.

An agreement for the sale of a public house, stated, that the sale was subject to the covenants set forth "in a draft of a lease delivered this day." The agreement itself contained less than 1080 words: *Held*, that the covenants referred to, were not to be taken into account, in calculating the amount of stamp duty, and that, therefore, a 1*l*. stamp was sufficient.

Kelly now moved accordingly. The agreement ought not to have been admitted in evidence, as the stamp was insufficient. [*Parke*, B.—By the stamp act, 55 Geo. 3, c. 184, Schedule, Part 1, "Agreements," the matter of which is of the value of 20*l*., are subject to a 1*l*. stamp duty, that is, in the language of the schedule, "where the same shall not contain more than 1080 words, being the amount of fifteen common law folios or sheets of seventy-two words." In

1841.
SNEEZUM
v.
MARSHALL.

computing the number of words, the words of "every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto," are to be counted. In *Attwood v. Small* (a), an agreement, which provided that the provisions of another agreement should extend to it, as if the same were repeated therein, was held to be sufficiently stamped with a 1½ stamp, the instrument itself containing less than 1080 words, though if the provisions referred to, were to be counted, the words would have exceeded that number.] The covenants in the draft lease referred to in this agreement, are certainly not a "schedule, receipt, or other matter put, or indorsed thereon, or annexed thereto," but it is submitted that they are part and parcel of the agreement itself, and if so, they are to be included in reckoning the number of words. Otherwise, it would be easy for parties to evade the Stamp Act, one person might agree to take a house from another, upon terms, contained in a paper, delivered to a third party. If the paper is not to be taken into consideration, with reference to the Stamp Act, then though the real agreement contains more than 1080 words, a stamp as upon an agreement of a less number of words will suffice. In *Attwood v. Small*, the judgment of Lord *Tenterden* is founded upon the circumstance that the words referred to, were not in the instrument in question, nor in any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto. But that circumstance, it is submitted, is not sufficient to exclude the operation of the act, if the words referred are, in effect, part of the agreement. [Lord *Abinger*, C. B.—The word "agreement" in the schedule to the act, appears to me to be synonymous with "instrument."] If so, an agreement may be written on one sheet of paper, and refer to another sheet for the majority of the stipulations, then a stamp of the smaller amount will suffice. The application of the duty cannot,

(a) 7 B. & C. 390; 1 Man. & Ry. 246.

in reason, be made to depend upon the fact of there being a continuous writing, nor be prevented by the use of several sheets referring to one another.

1841.
 SNEEZUM
 v.
 MARSHALL.

LORD ABINGER, C. B.—I still entertain the opinion which I expressed at the trial, *viz.* that the act applies only to instruments executed by the parties, and to schedules and receipts, or other matters indorsed thereon, or annexed thereto; consequently, in this case, the covenants of the lease referred to, cannot be taken into account, in computing the words of the agreement. According to Mr. *Kelly's* argument, it would follow that if an agreement referred to any number of deeds, an increase of stamp would be requisite, because the agreement could not be fully understood, without looking at the deeds. We are asked to stretch the stamp act to an extent which no principle of construction warrants us in doing.

PARKE, B.—The act must be construed strictly, and it appears to me, that no increase of stamp was necessary. The case resembles *Attwood v. Small*. The ground of Lord *Tenterden's* judgment, in that case was, that “the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto.” Applying that principle to the present state of facts, it is clear, that the stamp was sufficient, and the agreement properly received in evidence.

GURNEY, B.—The words of the Stamp Act, imposing the duty, are confined to specified classes of cases, and this case, in my opinion, is not within them.

ROLFE, B., concurred.

Rule refused.



1841.

WHEELER v. SENIOR.

A count in assumpsit stated, that the plaintiff made his bill of exchange, which the defendant accepted, and that before the bill became due, the plaintiff had parted with the possession thereof, and thereupon, in consideration, that the plaintiff would again procure possession of the bill, and prevent the same from being presented for payment, the defendant would remit the plaintiff the amount (728*l*. 6*s*.) on a certain day : averment of performance by plaintiff, and breach by defendant.

Plea, as to 609*l*. 10*s*. parcel of the said sum of money therein mentioned, that defendant paid to plaintiff 700*l*., in satisfaction of the sum of 609*l*. 10*s*. parcel of certain monies specified in a bill, of exchange, dated, &c., which is the same identical bill declared on.

Replication, denying that the bill mentioned in the plea, is the same identical bill, concluding to the country : *Held*, that the replication was bad on special demurrer.

Semble, that the plea was also bad for not alleging the money to have been paid, in satisfaction of damages.

ASSUMPSIT. The first count was on a bill of exchange, bearing date the 15th of February, A. D. 1840, drawn by the plaintiff upon, and accepted by the defendant, for the payment of 728*l*. 6*s*., three months after date. The second count stated, that the plaintiff made his last mentioned bill of exchange, and the defendant accepted the same in manner and form as in the last count alleged, and thereupon, afterwards, and just before the same bill of exchange became due and payable, he, the said plaintiff, had parted with the possession of the same to certain persons carrying on the trade of bankers, and the same would have been presented to the defendant for payment on the day the same became due and payable by the said persons, of all which premises the defendant then had notice. And thereupon, it was then agreed by and between the plaintiff and the defendant, that in consideration that the plaintiff would, at the request of the defendant, again procure the possession of the said bill of exchange, and prevent the same from being presented for payment to the defendant on the day it became due, and hold and keep the same, and give time for payment to the defendant of the same for a long space of time, to wit, until the Wednesday then next following, to wit, &c., he, the defendant, then promised the plaintiff that he, the defendant, would remit the amount thereof, that is to say, the said sum of 728*l*. 6*s*. on the Wednesday then next, that is to say, the Wednesday aforesaid. And the plaintiff saith, that he, confiding in the said promise and agreement, did use his exertions and endeavours, and did again procure the possession of the said last mentioned bill of exchange, and prevent the same from being presented for payment to the defendant on the day

1841.

WHEELER

v.
SENIOR.

it became due, and held and kept the same, and gave time of payment to the defendant of the same for the said long space of time, to wit, until the said Wednesday following, that is to say, the Wednesday aforesaid, and has kept and held the same thence hitherto. Yet, the defendant not regarding his said promise, did not nor would remit to the plaintiff the amount of the said bill of exchange on the said Wednesday then next, that is to say, the Wednesday aforesaid, or any part thereof, but wholly neglected and refused so to do, nor did he, nor would he pay or satisfy, or cause to be paid or satisfied, to the said plaintiff, or any other person, on the said Wednesday, or at any other time, the said amount, except as to a small sum, to wit, the sum of 118*l*. 16*s*., part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and the said sum, except as aforesaid, still remains wholly due and unpaid to the plaintiff. The defendant pleaded to the second (a) count so far as relates to the sum of 609*l*. 10*s*., parcel of the said sum of money therein mentioned, that after the accepting of the said bill of exchange in that count mentioned, and before the commencement of this suit, the defendant paid to the plaintiff a large sum of money, to wit, the sum of 700*l*. in full satisfaction and discharge (amongst other things) of the sum of 609*l*. 10*s*., parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date, the 15th day of February, A. D. 1840, and then, to wit, on, &c. last aforesaid, drawn by the plaintiff upon, and accepted by the defendant. And that the plaintiff then accepted and received the said payment in such full satisfaction and discharge as aforesaid. And the defendant, in fact, saith that the said bill of exchange in the said second count mentioned, was and is the same identical bill of exchange as the bill of exchange hereinbefore mentioned, in respect whereof the said payment was so made as aforesaid, and not any other or different. Verification.

(a) There was a similar plea, replication, and demurrer to the first count.

1841.

WHEELER

v.

SENIOR.

Replication, that the said bill of exchange in the said second count mentioned, was not, nor is, the same identical bill of exchange in the said plea mentioned, and in respect whereof the said payment was so made as in that plea mentioned, in manner and form as in the said plea is alleged. And this the plaintiff prays may be inquired of by the country, &c.

Special demurrer, assigning for causes, that the said replication does not state how or in what manner the said bill of exchange in the said second count mentioned, is a different bill of exchange from that mentioned in the said second plea of the defendant, and for that, the said replication admits the existence of the bill of exchange in the said second plea mentioned, bearing date the same day and year as the day and year on which the said bill of exchange, in the said second count mentioned, is therein alleged to have been made, and also admits that the payment mentioned in the said second plea, was made by the defendant in the manner therein alleged, and yet the plaintiff in his replication doth not distinctly shew any other bill than that in the second plea mentioned, as the bill mentioned and declared on in the said second count; and for that, the plaintiff ought to have shewn and stated in his replication how and in what manner the bill mentioned in the said second count differs from the bill of exchange mentioned in the said second plea, that it might appear upon the pleadings, that the bill in the said second count, is, in fact, a different bill from that mentioned in the said second plea. And also, for that the said replication does not, as it ought to do, conclude with a verification, but tenders an issue to the country, and thereby precludes and shuts out the defendant from making any answer to the bill of exchange in the said second count mentioned; and for that, inasmuch as it appears from the pleadings, that there were two bills of exchange bearing date the same day and year, whereby the defendant supposed that the said bill of exchange in the said second count, was the bill

1841.

WHEELER
v.
SENIOR.

upon which the said payment mentioned in the said second plea, was so made as therein mentioned, the plaintiff ought, by the rules of pleading, to have new assigned, and shewn distinctly what was the bill of exchange, in respect whereof such payment was so made, and how and in what respect the said bill in the said second count differs therefrom, by which means the defendant would have had the opportunity of pleading to the said last mentioned bill, from which he is wholly precluded by the form of the said replication, and for that, the said traverse attempts, by inference only, to shew that the said bill of exchange in the said second count, is another and different bill from the one mentioned in the second plea, but does not state affirmatively and expressly that it was another and different bill, and for that, the said replication is otherwise insufficient.

Crompton, in support of the demurrer. The replication is bad in form; it admits the payment of a bill in all respects resembling the one mentioned in the second count, and then concludes with a traverse of the *quæ est eadem*. If the plaintiff meant to contend that the payment was made in respect of another and a different bill, he should have new assigned. Upon a plea of payment to the *indebitatus* counts, there is no occasion to new assign; because, if the sum alleged to have been paid in satisfaction of the plaintiff's demand, was not, in fact, received in satisfaction of that precise demand, the plea altogether fails, *James v. Lingham* (a), *Freeman v. Crafts* (b). But where the payment is alleged to have been made in respect of a particular bill, which is specified, the case resembles that of a declaration for an assault, and a plea of *son assault demesne*, where, if the plaintiff relies upon another assault, he must new assign. There is no instance of a traverse of the *quæ est eadem*, and by that form of pleading the plaintiff precludes the defendant from making any answer to the other bill.

(a) 5 Bing. N. C. 553; 7 Scott, 03.

(b) 4 M. & W. 4; *ante*, vol. 6, p. 698,

1841.

WHEELER
v.
SENIOR.

Suppose the case of two bills of the same date and amount, and in other respects precisely similar, and that the plaintiff declared on one, and the defendant, having paid one, pleaded that payment; upon those pleadings, the plaintiff could not say that he intended to rely upon the other bill; but he should have new assigned, in order to afford the defendant an opportunity of answering his claim as to such bill. *Heydon v. Thompson* (a), is precisely in point. Then it is objected that the plea is bad, because it does not allege the money to have been paid in satisfaction and discharge of the damages as well as of the money mentioned in the bill. But it is submitted that the plea is, at all events, an answer pro tanto, and if there is any part of the declaration left unanswered by the other pleas, the plaintiff may sign judgment for so much.

Whitshurst, contra. The plea does not allege that the payment was made in satisfaction of the money mentioned in the bill declared on, but that the defendant paid certain monies mentioned in a particular bill, of the same date, and which is averred to be the same bill. The plaintiff has a right to traverse the fact of the bill being the same, for without that averment the plea would afford no answer. If the defendant had alleged that the money was paid in satisfaction of the money mentioned in the bill, the plaintiff might have taken issue on that allegation, but by this form of pleading the *quæ est eadem* is rendered material. [*Alderson*, B.—If a declaration for an assault is so general, that the plea of justification will apply to an assault committed, either on one day or another, the plaintiff is driven to a new assignment. So, if there be two bills, which exactly correspond in every particular, and the defendant pleads, to one, payment, the plaintiff should shew, by a new assignment, that he declares on the other; it is only where the declaration is of such a nature, that the defendant must fail,

(a) 1 Ad. & El. 210; 3 Nev. & Man. 319.

unless he proves his plea that the plaintiff need new assign.] A new assignment would cast upon the plaintiff the burden of proving that there were two bills similar in every respect, *Hall v. Middleton* (a). At all events the plea is bad; by the terms of the contract, the money is to be paid on a certain day, but the plea does not allege that the money was paid on that day, nor does it afford any answer to the damages. [*Parke, B.*—In the case of judgment by default, the plaintiff would recover something more than the amount of the bill, and there appears to be no answer to that. The question is, what is the meaning of the preamble of the plea? If it means that the sum mentioned in the plea is parcel of the damages, it is good; but if it applies to parcel of the money mentioned in the bill, the plea is not good, because it does not shew a payment on the day the bill became due, and was no answer to the interest.] The correct mode of pleading would have been, “as to the breach of the said promise, so far as relates to the sum of £—, parcel, &c.” *Perry v. Odingsell* (b), is an authority to shew that payment, after a note is due, cannot be pleaded in satisfaction. Upon the non-performance of the contract, a damage accrues to the plaintiff, and the plea ought to allege a payment in discharge, not only of the promises and undertakings, but also of all costs and damages in respect of the breach thereof, *Francis v. Crywell* (c).

1841.
 WHEELER
 v.
 SENIOR.

Crompton, in reply, referred to *Corbett v. Swinburne* (d), in which it was held, that a plea of payment in satisfaction of the defendant's promise and damages, without mentioning costs, was good after verdict, and contended, that the objection to the plea could not be raised on general demurrer.

Cur. adv. vult.

On a subsequent day,

LORD ABINGER, C. B., after stating the pleadings, said,

(a) 4 Ad. & El. 107; 5 Nev. & Man. 410.

(b) 4 Mod. 250.

(c) 5 B. & Ald. 886.

(d) 3 Nev. & P. 551.

1841.

WHEELER
v.
SENIOR.

There was a demurrer, on the ground, that if the plaintiff meant to set up another bill, he should have given the defendant an opportunity of answering that claim, by making a new assignment. We entertained some doubt on the point, and I should be better satisfied if the decisions authorised us to say that the replication is good; but we think the case is governed by the authority of *Hayden v. Thompson*. The plaintiff may have liberty to amend his replication, and, if he thinks fit, he may demur to the plea.

Judgment for Defendant, with liberty for Plaintiff to amend accordingly.

REGINA v. Bishop of EXETER.

The Attorney general has a right of audience, before the Tubman and Postman, when moving on business in which the Crown is interested.

ON the Court going through the bar, the *Lord Chief Baron* called on the Tubman, (*Tyrwhitt*), to move, whereupon

The Attorney General rose, and stated, that he was desirous of moving in the case of *The Queen v. The Bishop of Exeter*, on a question relating to legacy duty; he claimed for the law officers of the Crown, a general right of pre-audience in all matters in which the sovereign was interested.

The Postman (*Whately*), and Tubman, severally protested against any claim of pre-audience, as against them.

PER CURIAM.—In all matters relating to the business of the Queen, the *Attorney General* has a right to be first heard.

1841.

SCHELLETER *v.* COHEN.

IN this case, the defendant had been arrested by virtue of a writ of *capias* issued in pursuance of an order made by Rolfe, B., under the 1 & 2 Vict. c. 110, s. 3. The order had been made upon an affidavit, which had been sworn before any writ of summons was sued out, and which was not entitled in the cause.

An affidavit to obtain a *capias* under the 1 & 2 Vict. c. 110, need not be entitled in the cause, if made before the writ of summons is sued out.

Ogle moved to rescind the order for the *capias*, and contended, that as the second section of the 1 & 2 Vict. c. 110, required the action to be commenced by writ of summons, the affidavit should have been entitled in the cause.

LORD ABINGER, C. B.—Some doubt has existed upon this point, but, upon consideration, the judges have come to a resolution, that where no writ of summons has been sued out, the affidavit need not be entitled in the cause. We think that the word “plaintiff,” in the 1 & 2 Vict. c. 110, must be construed in the same sense as that word in the statute for preventing frivolous arrests, and must be taken to mean the party who makes the affidavit to hold to bail, with the intention of becoming plaintiff.

PARKE, B.—I have constantly made orders of this description, in cases where the affidavit has not been entitled in the cause, and I have done so upon this principle, that where no writ of summons has been sued out, it is not necessary to entitle the affidavit. If, indeed, a writ of summons had issued before the affidavit was made, the case would be different, for then there would be a cause in Court. We have already held that it is not necessary that the writ of summons should be *served* before the *capias* is applied for (*a*). If a contrary practice was established, it

(*a*) *Brooke v. Snell*, *Ante*, vol. 8, p. 360.

1841.
 SCHELLETER
 v.
 COHEN.

would be productive of great inconvenience, since a plaintiff residing in the country, would be obliged to ascertain from his agent in London, whether a writ of summons had issued before he could take any step to have the defendant arrested.

Rule refused.

MACKAY v. WOOD.

In an action by indorsee against acceptor of a bill of exchange, a plea that the drawer had been twice a bankrupt, and that his estate had not produced 15s. in the pound, under the second fiat, is an issuable plea.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. The defendant, who was under terms of pleading issuably, proposed to plead, (in addition to a denial of the acceptance and indorsement), that before the making of the bill in question, the drawer had been twice a bankrupt, and that his estate had not produced 15s. in the pound under the second fiat, by reason whereof the property in the bill vested in his assignees (a). *Gurney, B.*, at Chambers, had refused to allow this latter plea, on the ground that it was not an issuable plea, whereupon

Butt had obtained a rule nisi, citing *Elston v. Brad-dick* (b).

Crompton shewed cause. This is not a plea which goes to the merits. The defendant, who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the Insolvent Debtors' Act, and that the cause of action has passed to his assignees, *Wettenhall v. Graham* (c). The present defence is, in substance, the same. Besides, the plea is frivolous, for, the acceptor of a bill cannot set up as against indorsee for value, facts which tend to shew that the drawer had no authority to indorse the bill, *Drayton v. Dale* (d).

(a) See 6 Geo. 4, c. 16, s. 127. Scott, 603.

(b) 2 C. & M. 435.

(d) 2 B. & C. 293; 3 D. & R.

(c) *Ante*, vol. 6, p. 746; 6 534.

Butt, in support of the rule, referred to *Willis v. Allen*(a) in which it was held, that the bankruptcy of a sole plaintiff, after cause of action accrued, and before the commencement of the suit, is an issuable plea.

1841.

MACKAY

v.
WOOD.

PARKE, B.—The only question which we are called upon to decide, is, whether or no this is an issuable plea? If, indeed, it was clear that the plea would be bad on demurrer, I agree that it could not be considered as an issuable plea; but that is a point of some nicety, and I am, at present, inclined to think the plea good. By the act of acceptance, the acceptor creates a species of property, which is, *prima facie*, in the drawer, but circumstances may exist, by reason of which the property is transferred to another person, as in the present case, to the assignees. *Ritchen v. Bartsch*(b) shews that such a case may exist.

ALDERSON, B.—Surely it is an issuable plea to say that the plaintiff has no right to bring his action at all. In *Humphreys v. The Earl of Waldegrave* (c), the term “issuable plea” was defined to mean a plea tendering some matter upon which, if issue be taken, the case would be decided upon the merits.

Rule absolute.

(a) 7 Scott, 475.

(c) *Ante*, vol. 8, p. 760.

(b) 7 East, 53.

— *See also v. R. v. B. v. L. 9; 2 Exch. 457.*

GREENWAY v. TITCHMARSH.

Reported 7 M. & W. 221.

ASSUMPSIT for breach of warranty of a horse. Pleas: In an action for the breach of warranty of a horse, the venue was changed by the defendant, and brought back into Middlesex, upon the usual terms of giving material evidence in that county.

Held, that evidence of payment for the keep of the horse in that county, satisfied the undertaking.

1841.
GREENWAY
v.
TITCHMARSH.

and after being changed by the defendant, had been brought back into Middlesex, on the usual terms, of giving material evidence of some matter in issue arising in that county. At the trial, before Lord *Abinger*, C. B., it appeared, that on the 14th of February, 1840, one Grout, the plaintiff's agent, bought the horse in question of the defendant, at Biggleswade fair, in Bedfordshire, with a warranty of soundness; and that on the 4th of March following, at Royston, in Hertfordshire, he told the defendant that the horse was unsound. On the 5th of March, the plaintiff's attorney wrote in Middlesex, and posted in London, a letter, addressed to the defendant, in which, after stating the horse to be unsound, and demanding back the price of it, he gave notice that unless the amount was paid, and the horse taken away by a certain day, it would be sold, and proceedings commenced for the difference. The horse remained for some days on the premises of Grout, and was provided by him with food and stabling, the charges for which were paid by the plaintiff in Middlesex. It was contended, for the defendant, that the plaintiff ought to be nonsuited, on the ground of his noncompliance with the undertaking to give material evidence on the trial of some matter arising in the county of Middlesex. A verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly,

Erle and *Miller* shewed cause. The letter of the plaintiff's attorney, written in Middlesex, and the payment in Middlesex of the charges of keeping the horse, were material evidence of matters in issue arising in that county, for they affected the amount of the damages sought to be recovered. In *Collins v. Jenkins* (a), a letter written by the plaintiff's attorney in Middlesex, apprising the defendant of the breach of the warranty, and that the horse was standing at livery

(a) 4 Bing. N. C. 225; 5 Scott, 589.

at defendant's expense, coupled with an admission in Middlesex, by the defendant's agent, of the receipt of that letter, was held sufficient compliance with an undertaking to give material evidence in that county. In *Curtis v. Drinkwater* (a), which was an action against the defendant for negligent driving, whereby the coach was overturned, and the plaintiff's leg broken, in Oxfordshire, from which county, after expense had been incurred, she was removed into Worcestershire, where further medical expense was incurred; it was held, that proof of the inconvenience and expense incurred in Worcestershire, was material evidence of a matter in issue arising there, within the meaning of the plaintiff's undertaking to change the venue. In *Linley v. Bates* (b), two letters, which were held to be material evidence in Middlesex, were written in that county, and despatched from the attorney's office.

1841.
 GREENWAY
 v.
 TITCHMARSH.

Kelly and Byles, contra. The evidence given by the plaintiff related merely to the damages, and was not material evidence of some matter in issue in Middlesex, within the meaning of the plaintiff's undertaking. The case of *Curtis v. Drinkwater* is distinguishable, because there, the injury to the wife affected, not merely the damages, but formed part of the cause of action. The letter of the 5th of March could be necessary only for the purpose of shewing that notice of the unsoundness had been given to the defendant on the day before. In *Collins v. Jenkins*, the admission of the receipt of the letter was the material evidence. They referred to *McKenzie v. Hancock* (c).

LORD ABINGER, C. B.—This rule must be discharged. We are not discussing the policy of the law relating to this question, but whether the decided cases shall be adhered to; and I have no hesitation in saying that I abide by those cases. Some actions may be brought in any county;

(a) 2 B. & Ad. 169.

(c) 1 Ry. & Moo. 436.

(b) 2 C. & J. 659.

1841.
 GREENWAY
 v.
 TITCHMARSH.

but, where all the witnesses reside in one county, it is better that the action should be brought there. Here, the plaintiff has undertaken to give material evidence of some matter in issue in the county of Middlesex, and he has fulfilled his undertaking, when he has given evidence of the payment for the keep of the horse; for such evidence relates to the damages which do come in issue.

PARKE, B.—I think this rule must be discharged, on the ground, that evidence relating to damages is material evidence of a matter in issue, within the meaning of the plaintiff's undertaking. The case of *Collins v. Jenkins* shews, that the evidence to be given under an undertaking like the present, is not to be confined to the mere issue, but extends also to damages. Payment in Middlesex for the keep of the horse, would be good evidence of the amount of damages. I should have entertained some doubts, if the case had stood entirely upon the letter.

GURNEY and ROLFE, Bs., concurred.

Rule discharged.

TURQUAND and Others, Assignees of VANDERPLANK, a
 Bankrupt, v. MOSEDON.

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 by the as-
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 bankrupt, the
 defendant
 pleaded that
 before the bankruptcy, he lent the bankrupt a sum of money, upon the deposit of the goods in question.

TROVER by the assignees of a bankrupt. The defendant pleaded, as to parcel of the goods in the declaration mentioned, that before the said B. Vanderplank and S.

before the bankruptcy, he lent the bankrupt a sum of money, upon the deposit of the goods in question.

Replication, that it was corruptly, and "against the form of the statute, &c.," agreed between the defendant and the bankrupt, that the latter should pay the defendant for the loan of the money above ten per cent. *Held*, on special demurrer, that the averment of the contract being against the form of the statute, was not a sufficient allegation that it was illegal, and that the replication was bad, for not alleging either that the contract was made before the 7 Wm. 4, & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts.

Vanderplank became bankrupts, they requested the defendant to lend and advance to them the sum of 150*l*., and then offered to the defendant, as a security for the repayment of the said sum to be so lent and advanced, and interest thereon, to deposit with the said defendant certain goods and chattels, to wit, ninety-six ends of grey cloth, and that the defendant should hold and retain the same until the said sum of 150*l*., so to be lent and advanced, and interest thereon, should be repaid and satisfied; and thereupon, before the said B. V. and S. V. became bankrupts, the defendant then contracted and agreed with the said B. V. and S. V. to make such loan and advance of 150*l*., upon having the said last mentioned goods and chattels so deposited with the said defendant, as such security for the repayment thereof, and upon the terms, that he might hold the said last mentioned goods and chattels as such security for the repayment of such loan; and the said B. V. and S. V. then contracted and agreed with the defendant to borrow of him, the defendant, and the said defendant then contracted and agreed with the said B. V. and S. V. to lend to them, at their request, the said sum of 150*l*. And the said B. V. and S. V. then contracted and agreed with the defendant to make the said deposit, and permit the said defendant to hold the said last mentioned goods and chattels as such security as aforesaid, for the repayment of the said loan and advance. That the said contract and agreement being so made as aforesaid, afterwards and before the said B. V. and S. V. became bankrupts, the defendant did accordingly, and in pursuance of the said contract and agreement, at the request of the said B. V. and S. V., lend and advance to them the sum of 150*l*., and in consideration thereof, the said B. V. and S. V. did then, and before they became bankrupts, in pursuance of the said contract and agreement, deposit with the defendant the said ninety-six ends of grey cloth, for the purpose, and under and upon the terms of the said contract and agreement. And thereupon, on the occasion aforesaid, and before the said B. V. and

1841.

TURQUAND
and Others

v.
MOSEDON.

1841.
TURQUAND
and Others
v.
MOSEDON.

S. V. became bankrupts, the said B. V. and S. V. then further contracted and agreed with the said defendant, that he should be at liberty to keep absolutely the said last mentioned goods and chattels at 2s. 8d. per yard, if decided on by the said defendant, in one month from the date of the said last mentioned agreement; and that if the said last mentioned goods and chattels should not be kept so absolutely by the defendant, they, the said B. V., and S. V. further contracted and agreed to give the defendant interest on the said sum of 150*l.*, so lent and advanced as aforesaid, at and after a certain rate then agreed upon between the said defendant and the said B. V. and S. V.; and that if the said last mentioned goods and chattels should be kept so absolutely by the said defendant, then that no interest was to be charged. That afterwards, and before the said B. V. and S. V. became bankrupts, and whilst they were so possessed of the goods and chattels in the introductory part of this plea mentioned, parcel, &c., and before the expiration of one month from the date of the last mentioned contract and agreement, and before the said defendant had decided to keep the said ninety-six ends of grey cloth at the rate aforesaid, and whilst the same ends of grey cloth were so in the possession of the said defendant for the purpose and under and upon the terms of the said contracts and agreements, it was further contracted and agreed by and between the said defendant and the said B. V. and S. V., and at the request of the said B. V. and S. V. that the said defendant should return and re-deliver to the said B. V. and S. V., the said ninety-six ends of grey cloth so deposited with the said defendant as aforesaid; and that in consideration of such return and re-delivery to the said B. V. and S. V., they, the said B. V. and S. V. should deposit with the said defendant in exchange for the said ninety-six ends of grey cloth, and in lieu and instead thereof, certain other goods and chattels, to wit, the goods and chattels in the introductory part of this plea mentioned, parcel, &c. And that the said defendant should receive, have, hold, and detain the said last mentioned goods and chattels,

parcel, &c., in such exchange, lieu, and stead of the said ninety-six ends of grey cloth, for the purpose and under and upon the terms of the said first mentioned contracts and agreements. The plea then averred, that the defendant returned the ninety-six ends of grey cloth, &c., and that the said B. V. and S. V. deposited with him in lieu thereof, the goods and chattels in the introductory part of the plea mentioned, that the defendant had not decided upon keeping the same, and that the 150*l*. and interest remained unpaid, wherefore the defendant detained the goods as he lawfully might.

Replication, that before the lending and advancing of the money in that plea mentioned by the defendant to the said B. V. and S. V., it was corruptly and against the form of the statute in such case made and provided, agreed by and between the defendant and the said B. V. and S. V., that they, the said B. V. and S. V., should pay to the defendant, for such time as the said defendant should forbear and give day of payment of the sum of money in the said plea mentioned, a certain sum of money, to wit, at and after the rate of 10*l*. per cent. per annum. And the said plaintiffs further say, that the said sum or rate so agreed to be given and paid by the said B. V. and S. V. to the said defendant for such loan and forbearance as aforesaid, exceeds the rate of 5*l*. for the forbearing of 100*l*. for a year, contrary to the form of the statute in such case made and provided. Verification.

Special demurrer, assigning for causes, that although the plaintiffs, by their replication, have confessed the making of the several contracts in the plea mentioned, and the lending and advancing of the money by the said defendant to the said B. V. and S. V., and the deposit of the said goods and chattels by the said B. V. and S. V. with the defendant under and upon the terms of the said contracts, yet the said plaintiffs have, in, and by their said replication, stated and insisted, by way of answer and avoidance, matters which, if true, since the passing of a certain act of Parliament, made and passed in the third year of Victoria, in-

1841.

TURQUAND
and Others

v.
MOSEDON.

1841.
 TURQUAND
 and Others
 v.
 MOSDON.

tituled "An act to amend and extend until the 1st day of June, 1842, the provisions of an act of the first year of her present Majesty, for exempting certain bills of exchange and promissory notes from the operation of the laws relating to usury;" have been and are wholly inoperative and insufficient as an avoidance and answer to the said matters in the said plea alleged. And also, that if the plaintiffs had intended to insist that the said B. V. and S. V. had made no such contracts for the loan and forbearance of money, as came within the intention of the said statute, they should have traversed or denied the statement in the plea, that the said B. V. and S. V. had made such contracts as are set forth, instead of admitting such facts as he has done, or if the plaintiffs had intended to insist that the same contracts and agreements were not such contracts as came within the protection of the above named statute, they should have shewn by their said replication, that this present action was commenced before the passing of the last mentioned statute, or that the said contracts were made and entered into by and between the said B. V. and S. V. before the passing of the last mentioned statute, or such other matters as the case might have required.

Wightman, in support of the demurrer. The replication affords no answer to the matter alleged in the plea. Since the 7 Wm. 4 and 1 Vict. c. 80, and the 2 & 3 Vict. c. 37, a contract to pay more than five per cent. interest on the loan or forbearance of money is not illegal, provided the sum lent be above ten pounds, and is not secured on land. In order, therefore, to render the replication good, it should have averred that the contract was made before the 7 Wm. 4 and 1 Vict. c. 80 came into operation. The allegation that the agreement was "against the form of the statute" is not sufficient; it may be against the form of the statute of 12 Anne, c. 16, but protected by the 2 & 3 Vict. c. 37. The defendant could not take issue on the allegation, that the agreement was against the form of the statute, because

the statute is in force, though this case does not fall within its provisions. The Court will not infer that the contract was illegal; that should have been distinctly shewn on the face of the replication, either by alleging that the contract was for a sum under 10*l.*, or that it came within the proviso of the 2 & 3 Vict. c. 80, respecting security on land.

1841.

TURQUAND
and Others
v.
MOSEDON.

Petersdorff, in support of the replication. The defendant should have taken issue on the replication, and then the plaintiff must have proved that the contract was made while the 12 Anne, c. 16, was in force, or have relied on some other fact, which excepted it from the operation of the 2 & 3 Vict. c. 37. If it was otherwise, a party would be bound to shew, not only that the act done was against the form of a particular statute, but also that it was not protected by any subsequent act. The averment that the contract was against the form of the statute, is *primâ facie* sufficient, and it is for the defendant to shew that his case falls within the protection of any subsequent act. It is an established rule of pleading, that where a party seeks to avail himself of a statute, and there is a proviso in the enacting clause, he must shew that his case is not within the terms of the proviso; but if the proviso is contained in another and distinct clause, he need not do so (*a*). The same rule applies with respect to informations before a magistrate, in which it is not necessary to negative any matter which is not contained in the particular section relied on. So, here, it is sufficient to allege that the contract was "against the form of the statute," and if the defendant relied upon any subsequent statute, as rendering it valid, he should have replied accordingly.

Per CURLIAM (*b*).—There must be judgment for the defendant.

Judgment for Defendant.

(*a*) Chit. Pl. 4th Ed. 322.

(*b*) Lord ABINGER, PARKE, and ALDERSON, B*s.*

1841.

The 3 & 4 Wm. 4, c. 42, s. 39, is not confined to cases in which either party has attempted to revoke a submission to arbitration, therefore, where two causes were referred to an arbitrator, so that he should make his award on a particular day, or on such ulterior day as he should appoint, and the arbitrator allowed the time limited for making his award to expire: *Held*, that the Court had power, under the above act, to enlarge the time.

NEWMAN v. PARBURY.

PARBURY v. NEWMAN.

Reported 7 M & W. 370.

THESE cases had been referred to arbitration, under an order of *Tindal*, C. J., which was subsequently made a rule of Court, and was in the following terms: "I do order that both these actions, and all matters in difference, be referred to the arbitration of, &c., so that he shall make and publish his award in writing, ready to be delivered to the said parties, or any or either of them, if they shall require the same, &c., on or before the 27th day of May next, or on or before such further or ulterior day as the said arbitrator shall from time to time appoint, and signify in writing, under his hand, on this my order." The arbitrator proceeded with the reference, and held several meetings, but before the cases were terminated, the time limited in the order of reference had expired. No application was made by either party to enlarge the time, but when the arbitrator was about to make his award, the plaintiff objected that the arbitrator's power was at an end.

Gaselee, Serjt., in Michaelmas Term, had obtained a rule nisi, to enlarge the time for making the award, until the first day of the following Term, against which,

Sir *F. Pollock* and *Macaulay* shewed cause. The question is, whether the Court have power to enlarge the time, under the 3 & 4 Wm. 4, c. 42, s. 39, which enacts, "that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of Court or judge's order, or order of nisi prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of His Majesty's Courts of Record, shall not be revocable by any party to such reference, without the leave of the Court by which

such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any judge thereof, may, from time to time, enlarge the term for any such arbitrator making his award." That clause gave the Court no authority in a case like the present; its object was simply to prevent either party from revoking the submission to arbitration. In *Burley v. Stephens* (a), the Court expressed an opinion that the 3 & 4 Wm. 4, c. 42, s. 39, was not confined to cases where there has been a revocation of the submission, but the observation of the Court in that respect was unnecessary for the decision of the point in question. In a subsequent case of *Doe d. Jones v. Powell* (b), a different opinion was expressed, and *Patteson*, J., referring to the clause in the statute which gave the Court power to enlarge the period for an arbitrator to make his award, says, "that means rather that the Court may enlarge the time, where no power is given to the arbitrator to do so; if there is such a power, it is for him to do it; but I doubt if the Court would do it in a case where the parties, or the arbitrator, will not consent to proceed with the reference. In this case, the rule seeks to enforce the consent of the party to the arbitrator's proceeding with the reference. Now, I think I cannot compel such consent to be given. It may be true that the party has acted against good faith, but that I cannot help, for that is not a revocation of the authority of the arbitrators, nor is this application for enlarging the term for making the award within the meaning of the statute." In *Potter v. Newman* (c), great doubt was expressed, as to whether the statute was not confined

1841.

NEWMAN

v.

PABBURY.

PABBURY

v.

NEWMAN.

(a) 1 M. & W. 156.

(c) *Ante*, vol. 4, p. 504.(b) *Ante*, vol. 7, p. 539.

1841.
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 NEWMAN
 v.
 PARBURY.
 PARBURY
 v.
 NEWMAN.

to such cases only where one party has improperly attempted to revoke the arbitrator's authority.

Cresswell and *Gaselee*, Serjt, contra. In the present case the Court have power, under the statute, to enlarge the time. It is conceded, that they might do so, if there had been an attempt at revocation, and there is no reason why an equal power should not exist when the parties are willing to proceed. *Hall v. Rouse* (a) shews that the order of reference does not become a nullity by the time limited, for making the award having been allowed to expire. There, by an order of nisi prius, a verdict was entered for the plaintiff, subject to the award of an arbitrator. The plaintiff's attorney neglected to deliver the order of reference to the arbitrator until after the time for making the award had expired, and it was held to be irregular to try the cause a second time without getting rid of the previous verdict. If then, the original submission remains in force, the Court have power to enlarge the time. In *Arthur v. Campbell* (b), a similar power was exercised by the Court in the case of a sheriff, who was ruled to return a writ by a particular day, and, from circumstances, was unable to do so, until the time had expired. It might, perhaps, be objected, that if such construction was put upon the 3 & 4 Wm. 4, c. 42, s. 39, the party might come at any future period, but it would rest in the discretion of the Court to entertain or refuse the application. Besides, the facts, as disclosed by the affidavits, amount to a consent to enlarge the time. It appears, that after the time had expired, the one attorney informed the other of the circumstance, and he replied, "Very well, I suppose the time can be enlarged by a judge's order." Afterwards, both parties attended the arbitrator, who proceeded with the reference. There was, in substance, an enlargement of the time. *Hallett v. Hallett* (c).

Cur. adv. vult.

(a) *Ante*, vol. 6, p. 656; 4 M. & W. 24.

(b) 2 N & M. 444.

(c) *Ante*, vol. 7, p. 389.

In the course of the present Term, the judgment of the Court was delivered by

1841.

NEWMAN

v.

PARBURY.
PARBURY

v.

NEWMAN.

LORD ABINGER, C. B.—The Court have considered this case, and are of opinion, that they have power under the 3 & 4 Wm. 4, c. 42, to enlarge the time for the arbitrator to make his award; but they are, at the same time, of opinion, that they ought not to exercise that jurisdiction under the peculiar circumstances of the present case. A difficulty has arisen in the course of the proceedings, namely, that the period during which the rule nisi proposes to enlarge the time for the arbitrator to make his award, has expired, while the Court has been considering the point which has been raised on the argument. The parties, however, will consider whether they will consent to a fresh rule being granted to enlarge the time, or what other course they will pursue under the circumstance.

Rule discharged.

CHRISTIE v. PEART.

THE declaration was in the following terms, “ William Christie, the manager of a certain joint stock society, or co-partnership, the shares whereof are transferable, established in Scotland for the purpose of banking, under the name and description of the Eastern Bank of Scotland, and which said William Christie hath been duly named and appointed as the nominal plaintiff for and on the behalf of the said co-partnership, under and according to the provisions of a certain act of Parliament made and passed in the

In an action by a banking co-partnership, suing under the provisions of the 7 Geo. 4, the declaration commenced “ W. C., manager of a certain joint stock society, &c., who has been duly named and appointed the nominal

plaintiff:” *Held*, sufficient, without alleging that he was named such manager, in pursuance of the act.

In an action by indorsee against acceptor of a bill, the declaration alleged that after the bill became due, the defendant promised to pay it “ according to the tenor and effect of his said acceptance thereof.” *Held*, on special demurrer, that this was, in effect, a promise to pay on request, and therefore sufficient.

1841.

CHRISTIE

v.

PEART.

seventh year of the reign of his late Majesty, King George the Fourth, intituled "An act to regulate the mode in which certain societies or co-partnerships for banking in Scotland may sue and be sued, complains, &c." The declaration then stated, that J. H. L. made his bill of exchange, which the defendant accepted, that J. H. L. then indorsed the same to J. H., who indorsed it to the said co-partnership, that the bill was not paid, although duly presented on the day when it became due, and the defendant afterwards promised the said co-partnership to pay them the amount of the bill according to the tenor and effect of his said acceptance thereof.

Special demurrer, the following causes amongst others were assigned, that it is not alleged in the declaration that the plaintiff was named such manager in pursuance of the provisions of the act of Parliament. That it is not alleged, that the society is established in Scotland under the provisions of the act of Parliament. That in the said declaration it is alleged, that after the said bill had become due and had been dishonoured, the defendant promised the said co-partnership to pay them the amount of the said bill of exchange according to the tenor and effect of his said acceptance thereof, whereas such promise would be insensible and repugnant, and would not, by law, be inferred, inasmuch as it would be a promise which it would be impossible to perform, if made as alleged, after the bill was due.

Bayley, in support of the demurrer. The plaintiff ought to have alleged in the declaration, that he was named and appointed manager in pursuance of the provisions of the 7 Geo. 4, and that the banking co-partnership was established in Scotland under the provisions of the statute. [*Parke*, B.—The case of *Spiller v. Johnson* (a), is an authority against you. *Alderson*, B.—The declaration states, that the plaintiff is duly named and appointed nominal

(a) *Ante*, vol. 8, p. 368; 6 M. & W. 570.

plaintiff, that is sufficient]. Secondly, the promise is improperly stated, it ought to have been alleged as a promise by the defendant to pay when he should be thereunto afterwards requested.

1841.

CHRISTIE
v.
PEART.

PER CURIAM.—After dishonour, a bill is payable on request, and, therefore, a promise by an acceptor after the bill has become due to pay it according to the tenor and effect of the acceptance is a promise to pay it on request. There must be

Judgment for the Plaintiff.

BEVERLEY v. CHRISTIE.

STAMMERS moved for leave to issue a distringas on a writ of summons. The defendant resided in the county of Northamptonshire, and three several applications had been made at his residence. On the first occasion, the answer given was, that the defendant was not at home; on the second (which was on the 30th of December), that he was gone to London on his way to Scotland; and on the third (which was on the 4th of January), that he was gone to Calais. [*Alderson*, B.—Does the affidavit state that to be untrue?] No, but it states a belief that the defendant keeps out of the way to avoid service.

The Court refused a distringas where upon the second application, the answer was, that "the defendant was on his way to Scotland," and on the third, that "he was gone to Calais," it not appearing that those answers were untrue.

PER CURIAM.—That is not sufficient, the affidavit should state that the answers were untrue.

Rule refused.

1841.

MOORE and Another, Assignees of HENRY TOMPKINS,
a bankrupt v. PHILLIPS, Esq.

The 2 & 3
Vict. c. 29,
(which renders
valid execu-
tions bonâ fide
levied against
the goods of a
bankrupt, not-
withstanding a
prior act of
bankruptcy.)
has not such a
retrospective
effect as to ap-
ply to cases in
which a fiat had
issued, and the
assignees were
appointed be-
fore the passing
of that act.

TROVER by the assignees of a bankrupt. The declaration alleged the possession of the goods by the assignees, and a conversion in their time. Pleas: That one E. Jones, on the 4th April, A.D. 1840, sued out of the Court of Queen's Bench a writ of fieri facias, directed to the sheriff of Hertfordshire, by which writ the Queen commanded the sheriff, that of the goods and chattels of H. Tompkins he should cause to be made the sum of 134*l.* 13*s.*, which the said E. Jones had recovered in the Court of Queen's Bench against H. Tompkins; the plea then stated the indorsement to levy 134*l.* 13*s.*, the delivery of the writ to defendant, who was sheriff; that defendant, as sheriff, after the bankruptcy of H. T., and before the issuing of the fiat, and before the return of the writ, to wit, on the 5th day of April, in the year aforesaid, seized and took in execution the goods and chattels of defendant, and did then, by sale thereof, levy 113*l.* 9*s.* 5*d.*; that the goods so seized were, before and at the time of the bankruptcy, the property of H. T., and liable to be taken under the said writ; that on the 4th May, in the year aforesaid, the Lord High Chancellor issued his fiat in bankruptcy, by virtue whereof the said H. T. was afterwards, to wit, on the 20th June, in the year aforesaid, adjudged a bankrupt; that on the said 20th June, the plaintiffs were appointed assignees of the estate and effects of H. T., and on the 21st June, the plaintiffs accepted the appointment; that plaintiffs became entitled, as such assignees, to the possession of the said goods, which is the same possession in the declaration mentioned. The plea concluded with an averment, that the writ of fieri facias so issued against the said H. T., was bonâ fide executed and levied by the defendant, being sheriff, before the date and issuing of the fiat; and that the said E. Jones had not, nor had the defendant, at the time of executing or levying of

such writ of fieri facias, notice of any prior act of bankruptcy committed by the said H. T., and that the judgment upon which the said fieri facias was issued, was not founded on a warrant of attorney or cognovit given by the said H. T., by way of fraudulent preference, to any creditor or creditors of the said H. T.

1841.
 MOORE
 and Another
 v.
 PHILLIPS, Esq.

Replication, that the plaintiffs were duly appointed assignees, before the passing of a certain act of Parliament, made and passed in the session held in the second and third years of the reign of our Sovereign Lady Queen Victoria, intituled, "An act for the better protection of parties dealing with persons liable to the bankrupt laws;" and the defendant committed the said grievances long before the passing of the said statute.

General demurrer and joinder. The point marked for argument was, "the defendant will contend that the 2 & 3 Vict. c. 29, is retrospective, and gives the law to this case."

Shee, Serjt., in support of the demurrer. It appears from the pleadings, that the levy was made after the act of bankruptcy, and before the issuing of the fiat, and that the assignees were appointed before the 2 & 3 Vict. c. 29, came into operation. The question then is, whether, under those circumstances, the act has a retrospective effect, so as to defeat the title of the assignees to the goods? *Edwards v. Lawley*(a), which was the first case decided on this act, cannot be considered as any authority to shew that the act is no retrospective, because there the act of bankruptcy and the levy took place before the passing of the statute, but the fiat did not issue until after; it, therefore, became unnecessary to decide whether or no the act had a retrospective effect. It is true that *Parke*, B., there observes, that "if a fiat had issued, and assignees had been appointed before the act passed, they would have had at the time of the seizure a vested right to the property of the bankrupt, and it would have been unjust to consider the act as de-

(a) *Ante*, vol. 8, p. 234; 6 M. & W. 285.

1841.
 {
 MOORE
 and Another
 v.
 PHILLIPS, Esq.

feating that right, and depriving them of any part of the property. Even if the assignees had not been appointed when the act passed, provided the fiat issued before the date of the act, we should, in that case, also construe it so as not to defeat the right of the assignees." But those dicta must be considered as overruled by the case of *Luckin v. Simpson* (a), in the Court of Common Pleas, which ex-

(a) This case, which has not appeared in the Reports, was argued in Michaelmas Term, 1839, by *Talfourd*, Serjt., and *Shee*, for the plaintiff, and by *Bompas*, Serjt., and *Petersdorff*, for the defendant. The Court took time to consider, and in Trinity Term, 1840, the judgment of the Court was delivered by

TINDAL, C. J.—The question comes before the Court upon a rule to shew cause, why a certain order and certain rules of the Court, by which an issue had been directed to try, whether, at the time of awarding the fiat in the bankruptcy, against Simpson, the defendant, in the original action, the different requisites existed, which are necessary to support the commission, in which issue, the assignees of Simpson were directed to be the plaintiffs, and Luckin, the judgment creditor, the defendant, should not be set aside. It appears, that the writ of fi. fa., of the plaintiff Luckin was put into the hands of the sheriff, on the 16th of February, 1839, and the fiat was not issued until the 23rd of the same month. But whilst these orders of the Court were pending, and before the trial of the issues, the statute was passed, 2 & 3 Vict. c. 29, intituled, "An act for the better protection of

parties dealing with persons liable to the bankrupt laws," and received the royal assent upon the 19th of July, 1839. That statute enacted, amongst other things, "That all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, should be deemed to be valid, notwithstanding any prior act of bankruptcy, by such bankrupt committed," provided there was no notice of any prior act of bankruptcy. The application, therefore, on the part of the plaintiff, in the original action, the judgment creditor, was, that the rules which had been obtained for the trial of the issue might altogether be set aside, and the sum of 60*l.* 17*s.*, produced by the sale of the goods, and paid into Court by the assignees, might be paid out to him, the plaintiff, on the alleged ground that the trial would now be altogether useless, the execution having been completed, before the fiat was issued. The whole question, therefore, between the parties, resolves itself into the single point, whether the statute 2 & 3 Vict. c. 29, is prospective only, so as to govern no executions or other transactions except such as take place after

previously decided, that the 2 & 3 Vict. c. 29, has a retrospective effect, and applies to cases in which the fiat has issued,

1841.

MOORE
and Another

v.
PHILLIPS, Esq.

the statute passed into a law; or whether it was retrospective also, so as to give the law to transactions which had actually taken place before the passing of the statute, whenever they were brought before the Court for adjudication after the statute. And we are of opinion, looking at the words of the statute, that it gives the law to all cases that come for adjudication before the Court, where the execution was executed before the fiat in bankruptcy, whether the transaction brought before the Court took place before or after the passing of the statute. The statute recites the 82nd section of the 6 Geo. 4, c. 16, and in its mode of recital treats it as an enactment, that relates to "all payments really and bonâ fide made by any bankrupt, or to any bankrupt;" using only the word "made" in the past tense, notwithstanding the section itself contains the expression "really and bonâ fide made, or thereafter to be made;" the very mode of recital, therefore, appears to afford a legislative authority, that the 82nd section comprehends within it, bygone transactions, a point which had already been decided by the courts of law: See *Churchill v. Crease* (a), *Terrington v. Hargreaves* (b). And the statute now under consideration, continues to recite, "That it is expedient that further protection should be given to persons dealing with bank-

rupts, before the issuing of any fiat against them; and then enacts, in general terms, and without reference to any future time, "that all executions and attachments against the lands, and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy, by such bankrupt committed," under certain conditions which do not apply to this case. The recent statute being, therefore, made in *pari materiâ* with the former, and expressly in furtherance of the objects of the former, ought, as it appears to us, to receive the same construction as to its operation, and to be held to comprehend and govern the case before us. We, therefore, think the order for the trial of the issue, which has now become useless, and the other rules dependant thereon, should be discharged, and the produce of the sale of the goods paid out of Court to the judgment creditor; but, under the peculiar circumstances of the case, without any costs on either side.

Rule absolute.

The Reporter has been favoured with the above note by John Scott, Esq., and it will also appear in vol. 8 of his accurate and valuable Reports.

(a) 5 Bing. 177; 2 M. & P. 415.

(b) 5 Bing. 489; 3 M. & P. 137.

1841.
 MOORE
 and Another
 v.
 PHILLIPS, Esq.

and the assignees have been appointed before the passing of that act. [*Parke*, B.—In that case, the attention of the Court was not called to the circumstance of the assignees having been appointed before the act passed; the effect of the judgment of the Court of Common Pleas, would be to defeat the vested rights of the assignees]. The subsequent case of *Nelstrop v. Scarisbrick* (a), in this Court, recognizes the doctrine laid down in *Luckin v. Simpson*. It may be said that *Nelstrop v. Scarisbrick* is distinguishable, because there, though the fiat issued before, the assignees were not appointed until after, the 2 & 3 Vict. c. 29 came into operation: but Lord *Abinger*, C. B., says, “I go the full length of the decision of the Court of Common Pleas, and think it unnecessary to take the narrow view of the subject suggested. In every case where execution is issued, and neither mala fides, nor any knowledge of the fiat of bankruptcy can be shewn to have existed on the part of the execution creditor, the transaction is protected against the bankruptcy and its consequences; and I think that the doctrine of the Court of Common Pleas is both right as law, and in accordance with the justice of the case. The struggle here is not to give effect to vested rights, but to defeat them, and I am glad to see that the Court of Common Pleas has so construed the statute, as not to allow those rights to be taken from parties who have asserted them.” The recital of the 2 & 3 Vict. c. 29, shews that the object of the legislature was to destroy the doctrine of relation: it refers to the statutes, 6 Geo. 4, c. 16 and 2 Vict. c. 11, the former of which rendered valid all payments, and the latter all conveyances, really and bonâ fide made by any bankrupt before the date and issuing of the commission, notwithstanding any prior act of bankruptcy. The language of the 2 & 3 Vict. c. 29, is abundantly sufficient to protect executions in all cases, whether the title of the assignees has vested or not. It enacts, “that all executions

(a) *Ante*, vol. 8, p. 746; 6 M. & W. 684.

and attachments against the lands and tenements, or goods and chattels of any bankrupt, bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy, provided the person at whose suit, and on whose account such execution or attachment shall have issued, shall not, at the time of executing or levying such execution, have notice of such prior act of bankruptcy." The words used are not "shall be," but "shall be deemed to be valid," and must be construed as giving the statute a retrospective operation.

1841.
 MOORE
 and Another
 v.
 PHILLIPS, Esq.

Erle was about to argue in support of the replication, when

LORD ABINGER, C. B., said—The inclination of the Court is to decide with you, but we cannot with propriety do so without consulting the Court of Common Pleas. If we should afterwards entertain any doubt on the subject, we will hear you, but at present it is unnecessary.

Cur. adv. vult.

On a subsequent day

LORD ABINGER, C. B., said—In this case we retain the opinion which we formerly expressed, namely, that the act has not a retrospective operation where the title of the assignees has vested before the act passed. *Luckin v. Simpson* certainly appears to have been a case in which the assignees were appointed before the passing of the act, but the judges of the Court of Common Pleas say, that if their attention had been particularly called to that fact, they should have considered that the vested rights of the assignees ought not to be injured by the act of Parliament.

Judgment for the Plaintiffs.

1841.

In a contract for the sale of land, it is the duty of the vendee to prepare the conveyance, unless there is an express stipulation to the contrary; therefore, in an action against him for non-payment of the purchase-money, the declaration need not allege a tender or offer to convey, but it is sufficient to state that the plaintiff was ready and willing to convey.

By articles of agreement for the sale of certain premises, the defendant covenanted with the plaintiff, and with the several other parties beneficially interested in the premises: *Held*, that their interest was several, and that the plaintiff might sue alone.

POOLE v. HILL.

COVENANT. The declaration stated, that whereas on the 11th of October, A. D. 1839, by certain articles of agreement then made between the plaintiff of the one part, and the defendant of the other part (profert), after reciting that the defendant, on the 19th of April, A. D. 1838, entered into four several contracts or agreements with Mr. T. W. Jones, as agent for and on behalf of the plaintiff and other owners of the hereditaments thereafter described, for the purchase of a messuage or dwelling-house, out-buildings, &c., in the said indenture more particularly described, lying and being, &c., and which were then in the several holdings or occupations of the plaintiff, T. Hassall, G. Glover, and A. Steele, their respective assigns or under tenants, for the several prices or sums of 800*l.*, 510*l.*, 260*l.*, and 350*l.*, making together the sum of 1,920*l.*, exclusive of the timber trees, and saplings of the value of 2*s.* 6*d.* and upwards, growing on the said lands; and that all the objections to the title of the said purchased messuage, lands, and premises (except the want of a conveyance from Miss A. M. Hopkins of the legal estate, affecting one moiety of the said messuage, land, and premises which was outstanding in her as the infant heiress at law of the party in whom such legal estate was last vested), having been cleared up and obviated, the defendant was then desirous, and had proposed and agreed to complete his said purchase and contracts, and to accept a conveyance of the said purchased premises from the plaintiff and the other parties interested therein, without requiring the said A. M. Hopkins to join in such conveyance, or to execute any separate conveyance of the legal estate so outstanding in her as such infant heiress at law as aforesaid, provided he was allowed till the 1st of January then next for that purpose, which arrangement the plaintiff had acceded to, as she did admit and acknowledge by being made a party to

1841.

POOLR

v.

HILL.

and executing the said articles of agreement; it was by the said articles of agreement witnessed, that in consideration of the premises aforesaid, and for putting an end to all further disputes touching the title to the said messuages, lands, and premises, or the fulfilment and performance of the contracts or agreements so entered into by the defendant for the purchase of the same premises as thereinbefore was mentioned, he, the defendant, did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, her heirs, executors, and administrators, and also to and with the several other parties beneficially interested in the said messuage, lands, and premises, their respective heirs, &c., in manner following, that is to say, that he, the defendant, his executors and administrators, should and would, on or before the said 1st of January, A. D. 1840, fulfil and perform the said several purchases, contracts, and agreements, so by him entered into as aforesaid, by paying the purchase monies thereby agreed by him to be paid for the said messuage, lands, and premises to the plaintiff and the several other parties beneficially interested therein as aforesaid, and by accepting a conveyance of the said purchased premises from such parties without requiring the said A. M. Hopkins to join therein, or to execute any separate conveyance of the legal estate so outstanding in her as such infant heiress at law as aforesaid, anything contained in the said purchases, contracts, or agreements to the contrary thereof in any wise notwithstanding, as by the said agreement, will more fully appear; and the plaintiff saith, that the purchase monies, by the said several purchases, contracts, or agreements agreed by the defendant to be paid for the said messuage, lands, and premises to the plaintiff and the said other parties beneficially interested therein as aforesaid, were and are the said several sums of 800*l.*, 510*l.*, 260*l.*, and 350*l.*, making together the said sum of 1,920*l.*, &c.; and although the plaintiff hath performed and fulfilled all things in the said articles of agreement contained

1841.

POOLE

v.

HILL.

on her part to be performed and fulfilled, and although she and the said several other parties beneficially interested in the said messuage, lands, and premises have always, from the time of making the said articles of agreement, been ready and willing to execute and make the defendant a conveyance of the said purchased premises so to be executed and made as aforesaid; and although the said 1st of January, A. D. 1840, and the time for the payment of the said purchase monies had elapsed before the commencement of this suit, nevertheless the plaintiff, in fact, saith, that the defendant hath not yet hitherto paid the said purchase monies, so by the defendant agreed to be paid as aforesaid, or any part thereof, to the plaintiff and the other parties beneficially interested in the said messuage, land, and premises, or any or either of them; and the said purchase monies remain wholly due and unpaid, &c.

General demurrer and joinder. The points marked for argument were, that the action should have been brought by the plaintiff and the other parties interested, the covenant being joint and not several; and the declaration is bad, in not averring that the plaintiff and the other persons mentioned, conveyed or executed any conveyance, or tendered any conveyance to the defendant, such conveyance being a condition precedent, or a concurrent act to be done by the plaintiff and the said other persons. And that the supposed covenant is void in law, the other persons not being named, nor bound by any covenant to convey.

Whitehurst, in support of the demurrer. First, the declaration is bad, for not alleging a conveyance or an offer to convey. The only averment is, that the plaintiff and the other persons "have always, from the time of the making of the said articles of agreement, been ready and willing to execute and make the defendant a conveyance." Assuming that the defendant was bound to prepare the conveyance, still the plaintiff should have averred that she was ready

and willing, and offered to execute it. It never could have been the intention of the parties that the purchase money should be paid before the conveyance was executed. The rule of law deduced from the authorities is, "that where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred" (a). If the averment of being ready and willing to convey is held to be sufficient, the purchaser might be subject to an action, though he was desirous to complete the purchase. In this case, there is an implied covenant on the part of the vendor to convey; the declaration ought, therefore, to shew that he offered to execute a conveyance. In *Com. Dig.* tit. "*Covenant*," (A 2), it is said, "Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part." In *Peters v. Opie* (b), the agreement was, that the plaintiff should build a house, and that the defendant should pay him so much money for it; the plaintiff averred that he was ready and offered to perform his agreement, and it was doubted whether the declaration was sufficient, for not averring that the work was performed, or that the plaintiff was prevented from doing it by the defendant. In *Goodison v. Nunn* (c), which was an action on an agreement, whereby A. stipulated to sell B. his estate, for a certain sum, before a particular day, in consideration whereof B. agreed to pay that sum on the day, and on failure, to pay 21*l*.; it was held, that these were dependant covenants, and that A. could not recover the 21*l*. without shewing a conveyance on his part, or a tender of one. *Glazebrook v. Woodrow* (d), and *Jones v. Barkley* (e), are authorities to the same effect.

1841.

POOLE

v.

HILL.

(a) 1 Wms. Saund. 320, e. (n.)

(d) 8 T. R. 366.

(b) 2 Saund. 348.

(e) 2 Doug. 689.

(c) 4 T. R. 761.

1841.

POOLE
v.
HILL.

The Court then called upon

Crompton, in support of the declaration. In this case it is not necessary to aver a tender of the conveyance. It is admitted, that where a concurrent act is to be done, performance of it must be averred in the declaration; but that rule cannot apply to a case like the present, in which something must be done in the first instance by the other party. In every case, unless otherwise provided by the express terms of the contract, the deed of conveyance must be prepared by the vendee, *Baxter v. Lewis* (a), *Sugden on Vendors and Purchasers* (b). It is enough, then, to aver that the plaintiff was ready and willing to execute the conveyance. In *Price v. Williams* (c), the contract provided that a lease should be drawn, prepared, and executed at the sole expense of the lessor; in an action on the agreement by the lessee, it was held not to be necessary to aver that a lease was tendered to the lessor for execution. It is sufficient that the plaintiff is ready and willing to execute a conveyance when the defendant, whose duty it is to prepare it, enables him to do so. As to the other point, the interests of the parties are several, and, therefore, each may sue.

Whitehurst, in reply. The plaintiff should have averred an offer to execute a conveyance: for, from anything which appears, the defendant may have prepared it. It is a very different question, whether the defendant could have sustained an action for the non-completion of the contract, without having tendered a conveyance to the vendor for execution. *Goodisson v. Nunn* and *Glasebrook v. Woodrow*, clearly shew that a conveyance must be either made or tendered by the vendor, before he can sue for the purchase money. *Phillips v. Fielding* (d), and *Ferry v. Williams* (e), were also referred to. But there is a further objection, *viz.*

(a) Forrest, 61.

(b) 6th Ed. 222.

(c) 1 M. & W. 6.

(d) 2 H. Bl. 123.

(e) 8 Taunt. 62; 1 Moore, 498.

that the other parties beneficially interested are, in law, parties to the covenant, and ought to have joined in the action. Though they have not affixed their seals to the deed, they have made themselves parties to it by adopting it. Then the covenant being joint, all should have joined in the action, *Slingsby's case* (a).

1841.

POOLE

v.
HILL.

LORD ABINGER, C. B.—The interest of these parties is clearly several, and there is no ground to support the demurrer as to the non-joinder. We will consider the other point.

Cur. adv. vult.

The judgment of the Court was now delivered by LORD ABINGER, C. B.—[His lordship stated the declaration, and then continued as follows.]—We were at first disposed to think the averment, that the plaintiff was ready and willing to execute a conveyance, insufficient; but after hearing the argument of Mr. Grompton, and, upon consideration, we are satisfied that it is unnecessary to aver more than this. On a contract for the sale of lands, (unless otherwise stipulated) the conveyance is to be at the expense of, and to be prepared by, the purchaser. Here, it was for the purchaser to make out the conveyance in the usual course; that being done, his agreement is, on a given day, to pay the purchase money, and the plaintiff is to execute the conveyance, and complete the title. The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tendered a conveyance. He was to do the initiative before the plaintiff could be called upon to convey; and the plaintiff was not bound to execute the conveyance until the defendant had prepared and tendered it. The declaration is, therefore, good; and there will be

Judgment for the Plaintiff.

(a) 5 Co. Rep. 19,

1841.

COCKER v. TEMPEST.

Where a judge in vacation, made an order for a stay of proceedings, on the ground that they were brought against good faith; a motion on the last day of the ensuing Term to rescind that order, was held not too late.

The Court has unlimited power over its own process, and may stay proceedings brought against good faith, though the agreement was made whilst the parties were not under the authority of the Court.

THIS was an action for false imprisonment, against the late sheriff of Yorkshire. It appeared, from the affidavits, that on the 16th of May, 1840, the plaintiff had been taken in execution on a *ca. sa.*, and whilst in York Castle, an order for his discharge, purporting to come from the execution creditor, had been sent to the sheriff. It was afterwards suggested, that this order was forged, and the sheriff again took the plaintiff into custody. The plaintiff's wife then applied to the sheriff for his discharge, and was told that the plaintiff would be discharged upon signing a paper, which turned out to be an undertaking not to bring any action against the sheriff. The plaintiff signed the paper, and on the 26th of June, 1840, commenced the present action for false imprisonment. Application had been made to *Parke, B.*, to stay proceedings, and he made an order accordingly.

W. H. Watson, on the last day of Michaelmas Term, obtained a rule nisi to rescind the order of *Parke, B.*, against which

Creswell (*Humphreys* with him), in the present Term shewed cause. First, the application is too late. No fact is disclosed by the affidavits to account for the delay in not applying to the Court until the last day of the Term subsequent to the order. [*Parke, B.*—This is a mere lapse of time, and no injury having accrued to the defendant, we do not see anything to preclude the plaintiff from making the application. *Alderson, B.*—Lapse of time may, under some circumstances, preclude a party from applying to the Court, but those circumstances do not exist in the present case]. As to the other point, there can be no doubt of the power of the Court to stay proceedings when the justice of the case requires it. It is the constant practice to do so

where a second action is brought before the costs of a former suit are paid, *Weston v. Withers* (a), *Moulton v. Bingham* (b), *Baldwin v. Richards* (c). [Alderson, B.—The consolidation rule depends upon the same principle, and also the practice of the Courts before the late act, as to issuing commissions for examining witnesses. The only doubt appears to be, where the agreement is entered into whilst the parties are not under the authority of the Court]. The only difference in that case is, that the Court requires to be informed that the agreement was reasonable.

1841.

COCKER

v.
TEMPEST.

W. H. Watson, in support of the rule The Court has no jurisdiction to stay proceedings, except in cases where the agreement is made under the authority of the Court. When the parties are before the Court, the latter may impose upon them such terms as to giving security and paying costs as shall seem reasonable, but there is no power to exclude suitors from the Court. If, indeed, such power existed, it would be, in most cases, unnecessary to apply to the Court of Chancery for an injunction. According to the argument on the other side, every inferior Court might exercise the same power.

PARKE, B.—There is no doubt that the Court have power to stay an action which is brought against good faith, but the power is one which requires great discretion in the exercise of it.

ALDERSON, B.—The power of each Court over its own process is unlimited, it is a power incident to all Courts, inferior as well as superior; and were it not so the Court will be obliged to sit still and see its own process abused for the purposes of injustice. The exercise of the power is certainly a matter for the most careful discretion, and

(a) 2 T. R. 511.

(c) Id. n.

(b) Id. n.

1841.

COCKER

v.

TEMPEST.

where there are conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must, indeed, be used equitably, but if it is made out that the process of the Court is used against good faith, and we should omit to interfere to prevent it, it might truly be said, that we were sitting here to enforce injustice instead of to administer justice. The distinction between this power and that which is exercised by a Court of Equity in granting an injunction, is, that the injunction stops proceedings in another Court, this only in the Court in which the proceedings are.

GURNEY and ROLFE, Bs. concurred.

Rule refused.

KENRICK v. PHILLIPS.

Semble, that on a reference to arbitration, the particulars of the plaintiff's demand are not necessarily before the arbitrator, therefore, if the defendant seeks to restrict the plaintiff's claim to the amount of the particulars, he should produce them.

IN this case, a verdict for 500*l.*, was taken by consent, at the last assizes for the county of Denbigh, subject to a reference of the cause alone. The plaintiff, by his particulars of demand, had claimed 421*l.*, with interest, from the 1st of July, 1838, the aggregate of the two amounts being less than the amount of the verdict. The submission contained a power for the arbitrator to proceed *ex parte*, in case either party did not duly attend. The defendant did not attend any meeting, and the arbitrator awarded that the verdict should stand for the amount agreed upon at *nisi prius*.

Jervis now moved for a rule to shew cause, why the award should not be set aside. The arbitrator has exceeded his authority. He had power only to determine the cause, and has awarded a greater amount to the plaintiff than he claimed by his particulars of demand, by which he was

bound. *Bonner v. Charlton* (a), *Pearse v. Cameron* (b).
 [Lord Abinger, C. B.—The defendant does not choose to attend the arbitrator, and how can he complain of the award? He made no objection to the amount of the verdict.] The particulars of demand must be annexed to the record (c), and if that was not done in this case, it was the fault of the plaintiff, who cannot take advantage of his own error. [*Alderson*, B.—Your motion supposes that the nisi prius record was before the arbitrator. The fact is not always so. Indeed the ordinary practice is for the officer to keep it, and he enters the verdict finally, according to the arbitrator's award.] The record ought to have been before the arbitrator, and, therefore, the presumption is, that it was before him. If that were the case, and the particulars were not annexed, to uphold the award will be offering a premium upon fraud. [Lord Abinger, C. B.—I do not see what good can be done, unless the particulars are shewn to have been before the arbitrator. The object of the rule of Court, requiring the annexation of the particulars to the record, was to enable the defendant to refer to them. *Parke*, B.—The plaintiff was restricted to the amount of his particulars. The question now is, what ought to be taken as to the amount? Lord Abinger, C. B.—The defendant should have brought the particulars before the arbitrator, if he meant to limit the plaintiff's demand.]

1841.

KENRICK
 v.
 PHILLIPS.

The Court subsequently granted a rule nisi, to set aside the award, unless the Plaintiff would consent to reduce the verdict, to the amount of the particulars of demand.

(a) 5 East, 139.

(b) 1 M. & S. 675.

(c) Reg. Gen., T. T., 1 Wm. 4;

See 6 *Jervis's New Rules*, p. 43,
 4th edit.



1841.


REGINA v. WOOD.

In an action at the suit of the Crown, the Court has no power to issue a mandamus for the examination of witnesses in India.

THIS was an action of scire facias, upon a bond, at the suit of the Crown, for the due exportation of a quantity of hops.

Wightman, on the part of the defendant, had obtained a rule to shew cause, why a mandamus should not issue for the examination of a witness in India, against which

Jervis shewed cause. This application cannot be supported. The India Act, (13 Geo. 3, c. 63, ss. 40, 41, 42, 43,) authorizes the issuing of a mandamus, for the examination of witnesses in India, in certain specified criminal cases, and in actions at law, or suits in equity, commenced and prosecuted by the East India Company, or by subjects for causes arising in India, (section 44). The statute 1 Wm. 4, c. 22, s. 1, extends the provisions of the India Act to all the foreign possessions of the Crown, and to all actions depending in any of his Majesty's Courts of law at Westminster, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court, to the judges whereof the writ of commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter, wherein such writ shall be applied for. Sect. 4, enacts, "That it shall be lawful for each of the Courts at Westminster, &c., in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination, on oath, upon interrogatories or otherwise, before the Master or Prothonotary of the said Court, &c., of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to

issue for the examination of witnesses on oath, at any place or places out of such jurisdiction by interrogatories or otherwise, and by the same, or any subsequent order or orders, to give all such directions, touching the time, place and manner of such examination, as well within the jurisdiction of the Court, where the action shall be depending, as without, &c." By the former act, the Crown was bound only in relation to the criminal cases therein mentioned. By the latter act, the Crown, if bound at all, is bound only with reference to criminal cases, and so far as the Courts are thereby empowered to grant a mandamus for the examination of witnesses in such cases, in any of the foreign possessions of the Crown, besides India. This is a civil, not a criminal proceeding, and the only course is to file a bill in equity, *Bonham v. Leigh*(a). The books contain no precedent or authority to warrant this application; there is indeed a MS. case in the office, by which it appears, that an order was made in a case resembling the present, but there the depositions were objected to.

1841.
REGINA
v.
WOOD.

Wightman, contra. It is not denied that the defendant cannot obtain the object he seeks for, except under the statutes referred to, or by bill in equity, but it is contended, that the conjoint effect of the 13 Geo. 3, c. 63, and 1 Wm. 4, c. 22, is to empower the Court to issue a mandamus in this action, though, at the suit of the crown. As the crown was bound by the former of these acts to a certain extent, and the latter extends all the provisions of the former act, to all colonies, &c., "and to all actions" in the Courts at Westminster, the language is sufficiently comprehensive to include the case of an action at the suit of the Crown. It is true, that the Crown is not named in the latter act, but the reference to, and virtual incorporation of the India Act, in the stat 1 Wm. 4, c. 22, afford ground for inferring that the legislature intended to bind the Crown. If, however,

(a) 5 Price, 444.

1841.

REGINA
v.
WOOD.

the Court are of opinion that such is not the effect of the 1 Wm. 4, c. 22, they may, at all events, stay proceedings, unless the Crown consents to the mandamus issuing.

LORD ABINGER, C. B.—The 1 Wm. 4, c. 22, relates to actions between subject and subject, and the India Act, so far as the Crown is concerned, relates to indictments or informations for misdemeanors or offences committed in India. I think that the statute 1 Wm. 4, c. 22, does not so far adopt the provisions of the India Act, as to comprehend the case of an action at the suit of the Crown.

PARKE, B.—I think that the rule must be discharged. From the preamble to the statute, 1 Wm. 4, c. 22, it may be collected, that the intent of the statute was, to extend the remedy provided by the India Act, with respect to actions between subject and subject. But if it is to be understood as adopting the whole of the India Act, and applying it to all foreign possessions, then the answer to the application, as far as the Crown is concerned, is, that this is not an indictment or information in the Queen's Bench, for a misdemeanor or offence committed in any foreign possession, nor is it within any of the classes of criminal cases mentioned in the India Act.

GURNEY and ROLFE, Bs. concurred.

Rule refused.

LORD MACCLESFIELD v. BADDELEY.

In an action
on a bill of
exchange, with
a count on an
account stated,

THE declaration in this case contained a count on a bill of exchange, and a count on an account stated. A verdict the defendant obtained a verdict on the first count, and the plaintiff in the last. A rule was obtained to set aside the verdict for the plaintiff on the last count, and for a new trial: the Court allowed the plaintiff to discontinue, without payment of costs.

was found for the defendant on the first count, and for the plaintiff on the last. The defendant afterwards obtained a rule to set aside the verdict for the plaintiff on the last count, and for a new trial, whereupon

1841.
 Lord
 MACCLES-
 FIELD.
 v.
 BADDELEY.

Robinson, on the part of the plaintiff, obtained a rule nisi to discontinue, without payment of costs, against which,

Jervis shewed cause. The defendant has succeeded as to a part of the record, and has, at all events, a right to the costs of that issue. If the defendant had taken down the cause for trial by proviso, and had obtained a verdict, he would have been entitled to the costs of the former trial. Where, on the trial of a right of way, claimed in one count as a public, and in another as a private way, a general verdict was found for the defendant, and a new trial directed; as to the second count, it was held, that the defendant, having succeeded on the second trial, was entitled to the costs of the issues found for him on the first, *Bower v. Hill* (a), *Jolliffe v. Mundy* (b), may, perhaps, be cited as an authority to the contrary, but there a new trial was granted upon the whole record.

PARKE, B.—The rule must be made absolute. The plaintiff applies to the Court *ex debito justitia*, and I think we ought to grant the application. The defendant will not be prejudiced, as he could not carry the record down to trial as to part only. The case referred to must have been decided upon its particular circumstances,

Rule absolute.

(a) 2 Scott, 540.

(b) *Ante*, vol. 7, p. 225; 4 M. & W. 502.

1841.

WEBB v. JAMES and Others.

To debt on bond given as a security for the due performance of the office of collector of rates, and conditioned for payment of all monies received "by virtue, and for the purposes of a certain act of parliament, and relative to the collectorship of such rates," the defendant pleaded, that "no rate was made, or in any way existed, which he could legally and according to law, collect or get in, or could legally, or according to law, demand or obtain by virtue of his said office, and that he did not, during the continuance of his appointment, legally receive any money, by virtue, or for the purposes of the said act, or relative to the collectorship of the said rates.

Held, that the former part of the plea would

have been held bad on special demurrer, as a negative pregnant, for not shewing in what way the rate was illegal, but those objections not having been raised, the latter averment afforded a substantial answer to the action.

DEBT on bond, in the penal sum of 250*l*. The defendants pleaded, first, non est factum, after setting out the bond, and condition on oyer, which were as follows: "Know all men, by these presents, that we, Henry James, of, &c., W. Margery, and James Lewis, are jointly and severally held and firmly bound to Thomas Taylor Webb, of, &c., Treasurer, appointed by the commissioners acting under and by virtue of an act, made and passed in the 32nd year of the reign of his late Majesty, king George the Third, intituled, &c., in the penal sum of 250*l*, of, &c., to be paid to the said Thomas Taylor Webb, as such treasurer as aforesaid, and his successors for the time being, for which payment to be well and faithfully made, we bind ourselves jointly, and each of us bindeth himself severally, &c." "Whereas, in and by the above mentioned act, it was, amongst other things enacted, that the commissioners therein mentioned, or any five or more of them, should and might, from time to time, nominate, constitute, and appoint one or more treasurer or treasurers, clerk or clerks, surveyor or surveyors, and such collectors of the rates hereinafter mentioned, and such other officers as they should find necessary for the execution of the said act; and might, from time to time, remove and displace all or any of them, and nominate and appoint such other person or persons in the room of him or them who should be so removed, and that the said commissioners should and might, and they were thereby authorized and required to take such security from time to time, for the due execution of the said offices respectively, as the said commissioners should think proper. And whereas, the said Henry James having been duly elected and appointed collector of the rates due and payable

under and by virtue of the said act, and hath been called upon to give security for the due performance of the said office of collector of the rates: now, the condition of the above-written obligation is such, that if the above bounden Henry James shall, from time to time, during the continuance of the said appointment, or of any future appointment or appointments of him as collector as aforesaid, well and faithfully collect and get in all such rates as he may be directed to demand and obtain by virtue of his said office, and do and shall deliver to the said treasurer all books and papers, and a true and perfect account, in writing, of all matters and things committed to his charge, by virtue of the hereinbefore recited act, and also of all monies which shall have been by him received, by virtue and for the purposes of the said act, and shall and do pay all such monies as shall have been received by him, to the said Thomas Taylor Webb, or his successors, as treasurer for the time being, acting by virtue of the said act, relative to the collectorship of the said rates, then this obligation to be void, or otherwise to be, and remain in full force and effect.

Thirdly, the defendants say, that there was not any other or future appointment of him, the said Henry James, as collector as aforesaid, except the said appointment in the said condition mentioned; and that during the continuance of the said appointment, no rate was made or in any way existed, which he, the said Henry James, could legally, or according to law, collect or get in, or could legally or according to law, demand or obtain, by virtue of his said office; and that he did not, at any time during the continuance of the said appointment, legally receive any money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates; and that he did, from time to time, during the continuance of the said appointment, deliver to the said treasurer all books and papers, and a true and perfect account in writing, of all matters and things committed to his charge, by virtue of the act recited in the said condition. Verification.

1841.

WEBB
v.
JAMES
and Others.

1841.
 WEBB
 v.
 JAMES
 and Others.

Special demurrer to the last plea, on the grounds, first, that if the defendant James had received money by virtue and for the purposes of the act, and relative to the collectorship, he is not excused from accounting for it, and paying it over, by reason of any illegality connected with the receipt of it. Secondly, that the plea was a negative pregnant, and that it was ambiguous whether it meant to put in issue the receipt of the rates, or that he received them, but that such receipt was illegal. Thirdly, that the plea tendered an issue upon matter of law, on the illegal receipt of money, and the plaintiff could not take a certain or material issue thereon.

The defendants' points, as marked for argument, were, that the last plea is good, inasmuch as it alleges a substantial performance of the condition of the bond, according to the true intention thereof, which intention was merely to insure the due collection and payment over by the collector to the treasurer, of all monies which he could legally collect, and had legally received in his office of collector, and not to insure the collection or payment over of the rates, which the collector was not authorized by his office to collect.

Willes, in support of the demurrer. The plea does not shew either a performance of the condition, or allege any excuse for non-performance. It is also ambiguous whether the defendants mean to deny the receipt of the rates, or to allege that they are excused from paying them over on account of their having illegally received them. Admitting the rates to have been illegal, the collector is not excused from accounting for the money received, unless he has had notice from the rate-payers to refund it. The plea should then have averred that fact. The principle is similar to that stated in *Com. Dig.* tit. "*Accompt*" (E 4), where it is said to be a good plea in accompt, "that the plaintiff was a disseisor, and that the disseisee hath re-entered."

The Court then called upon

E. V. Williams to support the plea. The plea is good

if it shews a substantial performance of the condition. According to the intent of the parties, *Lord Arlington v. Merricke* (a) established that the terms of the condition are restrained and governed by the recital. Applying the principle of that case to the present, it will appear, that the object and intent of the parties was to obtain security for the due performance of the office of treasurer. That is shewn by a denial, that James "legally received any money by virtue, or for the purposes of the act, or relative to the collectorship." *Nares v. Rowles* (b) is an authority in point. That was an action on a bond taken to secure the due collection and payment over of public duties under an act of Parliament, and it was contended, in arrest of judgment, that the act never authorised the collection of the duties. Lord *Ellenborough*, C. J., says, "Looking at the condition of this bond, as it appears upon the record, I cannot say that if the rates were collected without any authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had illegally recovered the money, and would be entitled to retain it for his own indemnity. [*Parke*, B.—That is only a dictum of Lord *Ellenborough's*, and ought to be qualified; if a party pay money with a full knowledge of the facts, he cannot recover it back]. The question here is, not whether the rate-payer could maintain an action for money received to his use, but whether, under the terms of this condition, the sureties are liable? The object of the bond is not to secure the payment of monies illegally received, but of such as might be legally collected by virtue of the act. The condition recites, that James had been appointed collector "of rates due and payable, under and by virtue of the said act." As far as regards the sureties, the liability is limited to the accounting for monies legally received, 1 *Wms. Saund.* 414, n. 5. The special grounds of demurrer are directed to the allegation in the plea, as to the illegal receipt of the money, and do not extend to the averment,

1841.

WEBB

v.

JAMES
and Others.(a) 2 *Wms. Saund.* 403.(b) 14 *East*, 510

1841.
 WEBB
 v.
 JAMES
 and Others.

“ that during the continuance of the said appointment no rate was made, or in any way existed which he, the said H. James, could legally, or according to law, collect.” That fact then being admitted, the plea affords a sufficient *prima facie* answer.

Willes, in reply. It is admitted, as a general principle, that the condition of a bond is restrained by the recital, but in the present case the language is sufficiently extensive to include an irregular rate. At all events, the plea is a negative pregnant, and on that account bad, *Mylne v. Cole* (a), *Bac. Abr.* tit. “*Pleas*,” 420. It also tends to put in issue matter of law, and to bring before a jury the question, as to whether the rate was legal or not? The plea should have shewn in what the illegality of the rate consisted, *Abbot of Strata Marcellas’ case* (b), *Ransford v. Copeland* (c), *Hume v. Liversidge* (d), *Ashby v. Harris* (e).

LORD ABINGER, C. B.—We are satisfied that by the terms of the condition the collector was not bound to pay over monies unless received in pursuance of the act; we, therefore, think the plea good in substance, and that the other objections are not sufficiently raised by the demurrer. You had better amend.

PARKE, B.—I think the first part of the plea would have been liable to the objections raised, if they had been sufficiently pointed out by the special demurrer. It seems to me, that the plea should either have averred that no rate was made, or have shewn in what respect it was illegal. However, it is clear, from the context, that the demurrer points to the other allegation in the plea, *viz.*, that the collector “did not legally receive any money by virtue or for the purposes of this act.” That, however, appears to me a sufficient averment of performance of the condition,

(a) Cro. Jac. 87.

(b) 9 Co. 30.

(c) 1 Nev. & Per. 671.

(d) 1 C. & M. 332.

(e) *Ante*, vol. 5, p. 742.

and it is enough to say, that upon this demurrer the plea is good.

Leave to amend, otherwise judgment for Defendants.

1841.

WEBB

v.

JAMES
and Others.

The ATTORNEY GENERAL v. DONALDSON and Others.

THIS was an information of intrusion against the defendants, who were commissioners of sewers, and who had, in that capacity, rated the royal palace at Kensington, and levied the rate, by distress, in a house alleged to be part of the palace.

Ogle moved for a rule, calling on the *Attorney General* to shew cause, why the defendants should not be allowed to plead several matters. It was proposed to plead, first, not guilty; secondly, that the house in question was not part of the Royal Palace: thirdly, a justification under the powers vested in the commissioners of sewers. *The Attorney General v. Snow* (a), and *Rex v. Huggins* (b), were referred to as authorities in support of the application.

The 4 & 5 Ann. c. 15, (as to pleading double,) does not bind the Crown, therefore, in an information for intrusion, the Court has no power to compel the attorney general to allow the defendant to plead several matters.

PARKE, B.—If the *Attorney General* refuses to consent, we have no power to compel him. It is only under the 4 & 5 Ann. that a party has a right to plead double, and, unless that statute binds the Crown, we have no jurisdiction. Now the cases referred to, have been expressly overruled by the *Attorney General v. Allgood* (c), in which Parker, C. J., observes, that *Rex v. Huggins*, is misreported, and that the *Attorney General v. Snow* is accompanied with a quære of the Reporter, as to whether the 4 & 5 Ann. extends to the case of the Crown.

Rule refused.

(a) 1 Bunb. 96.

(b) Com. 422.

(c) Parker, 1.

COURT OF QUEEN'S BENCH.

Hilary Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1841.

Ex parte WILKINSON.

Where a clerk is articulated to an attorney, who, during the continuance of the articles, absconds, the Court will grant a rule to discharge the clerk from his articles, and permit it to be served at his last place of abode, in Q. B. Office, and on his agent, if he has one.

JAMES moved for a rule to shew cause, why an articulated clerk, named Wilkinson, should not be discharged from his articles, by which he was bound to an attorney of this Court who resided at York. After serving some time, the attorney fell into pecuniary difficulties, and absconded, in order to avoid his creditors. The question was, as to how the service of the rule should be effected? It was proposed, that the rule nisi should be left at the defendant's last place of abode at York, and be stuck up in the Queen's Bench Office. He cited an anonymous case, from 1 Chit. Rep. 558, note, a similar application had been granted, and where similar service directed.

WILLIAMS, J.—I think that service will be sufficient, if he has not an agent in town. If he has, I think he ought to be served also.

Rule nisi accordingly.

James afterwards made the rule absolute, no cause being shewn.

Rule absolute.

1841.

COCKER v. SHUTTLEWORTH.

FORTESCUE shewed cause against a rule nisi, obtained by *Whitehurst*, calling on the plaintiff to shew cause why the defendant should not sign judgment as in case of a nonsuit, he not having proceeded to trial pursuant to notice. It appeared, by the affidavit, that after issue had been joined, notice of trial was given for the last Summer Assizes. The plaintiff did not, however, proceed to trial, pursuant to his notice, and the present rule was obtained for judgment as in case of a nonsuit. The reason stated on the behalf of the plaintiff for not proceeding to trial was, that the defendant's attorney had surreptitiously obtained possession of a particular paper, which was essential to the plaintiff's case, from a servant of the plaintiff. The affidavit, however, did not disclose what the nature of the paper in question was. *Fortescue* contended, that this conduct of the defendant was an abundant excuse to the plaintiff for not proceeding to trial at the time stated in his notice. He also submitted, that the rule ought to be discharged, with costs, without requiring the plaintiff to give a peremptory undertaking. The defendant ought never to have applied for the rule.

If a defendant's attorney, improperly obtains possession of a document from a servant of the plaintiff, and which is essential to his case, it is sufficient excuse for not proceeding to trial, pursuant to notice.

Whitehurst, contra, was stopped by the Court.

WILLIAMS, J.—I think, that as the defendant, by thus obtaining possession of this paper, has prevented the plaintiff from proceeding to trial, it furnishes a sufficient reason why the rule should be discharged, on a peremptory undertaking by the plaintiff to proceed to trial at the next assizes; but that does not justify the discharge of this rule absolutely. The rule will, therefore, be absolute accordingly.

Rule absolute accordingly.

1841.

ADLAM v. NOBLE.

Where a judgment and execution are set aside for irregularity, the Court has no power to impose the term on the defendant, that he shall bring no action.

IN this case an application had been made successfully to set aside a warrant of attorney, a judgment signed thereon, and an execution levied, on the ground of non-compliance with the provisions of 1 & 2 Vict., c. 110, ss. 8 & 9. The rule was not moved with costs, and was made absolute without costs; but the defendant was restrained by the rule from bringing any action.

Addison afterwards applied to amend the rule, by striking out the term thus imposed. He contended, that the Court had no power to restrain a party from bringing his action, as the setting aside proceedings in question was a matter of right. It was true, that in some cases, where a party's proceedings were set aside, and he paying the costs of the application, the Court imposed the term, in poenam, that no action should be brought. That, however, was by consent, and the party had a right to refuse such an arrangement. Besides, in this case, no costs were prayed. He cited *Cash v. Wells* (a), where it was held, that the application for setting aside a judgment as against good faith, is *ex debito justitiæ*, and the Court will not impose on the defendant, as a condition for setting it aside, that he shall bring no action. Again, in *Abbott v. Greenwood* (b), the Court held, that if a proceeding is irregular the opposite party has a right to have it set aside; and, therefore, if the term of bringing no action, is not imposed by the Court at the time of disposing of the rule for setting aside the irregular proceedings, the successful party cannot be restrained from bringing an action in respect of irregularity. It was true, that in the case of *Lorimer v. Lule* (c), the Court held, that on setting aside a judgment and execution for irregularity, it would restrain the defendant from bringing an action of

(a) 1 B. & Ad. 375.

(c) 1 Chit. Rep. 134.

(b) *Ante*, vol. 7. p. 534.

trespass, unless a strong case of damages was shewn. That case, however, as well as the others to a similar effect mentioned in the note to it, must be considered as over-ruled by the two cases first cited.

1841.

ADLAM
v.
NOBLE.

Butt, in support of the rule, contended, that a power to restrain a party, under such circumstances, was vested in the Court, and he mentioned a case of *Fountaine v. Hall*, in which Mr. Justice *Coleridge*, sitting at Chambers, had restrained a party from bringing an action in a case similar in its facts to the present.

Cur. adv. vult.

WILLIAMS, J.—I have spoken to my brother *Coleridge* about the case of *Fountaine v. Hall*, and he informs me that that case was referred to him for the purpose of saying what ought to be done. He there took the question of staying any action in respect of the plaintiff's irregularity into his own hands. No one objected to this, and, therefore, it must be considered as having been done with the tacit consent of the defendant. My brother *Coleridge*, however, had no doubt, in his own mind, that if the defendant had objected, the term could not have been imposed. I think the present rule, therefore, must be simply made absolute, without saying anything as to bringing an action.

Rule absolute accordingly.

BAKER v. WELLS.

BUTT shewed cause against a rule nisi, obtained by *Mellor*, for an attachment for non-payment of costs, pursuant to an award, has been obtained in one Term, and dropped in consequence of negotiations between the parties, and part of the costs are paid, if it is sought to obtain an attachment for the non-payment of the residue, the rule for that purpose cannot be drawn up on merely reading the dropped rule, and an affidavit of fresh demand.

The Court will discharge a rule obtained on such materials, with costs, if an action for the recovery of the sum in dispute was pending at the time of the demand made.

1841.

BAKER

v.

WELLS.

suant to an award. The rule was drawn up on reading a rule nisi of Trinity Term, 1840, for an attachment in the same cause, and also on reading an affidavit of a demand of the sum in question from the defendant. *Butt* contended, that the materials on which the rule was drawn up were insufficient. It should have been drawn up on reading the rule of Court, the Master's allocatur thereon, and the award, in addition to the affidavit of demand.

Mellor, in support of the rule, contended, that, under the circumstances, the rule had been drawn up on sufficient materials. An award had been made, and the costs demanded in the usual way. In Trinity Term, 1840, a rule nisi, for an attachment for non-payment of the sum in dispute was obtained. That rule was drawn up on reading the rule of Court, the Master's allocatur indorsed, the award, and the affidavit of demand. After obtaining this rule, negotiations were commenced between the two parties for the payment of the money by instalments. A portion was paid, and the remainder left unpaid. Nothing further was done on the rule nisi for an attachment. In Michaelmas Term last, the present rule was obtained, and the facts being stated to the Court, Mr. Justice *Patteson* thought it would be sufficient to draw up the present rule, on reading the dropped rule of Trinity Term last, together with an affidavit of a fresh demand made. It was submitted, that the dropped rule being drawn up, on reading the proper materials for such an application as the present, it was sufficient to draw up this rule on reading the dropped rule.

WILLIAMS, J.—What is there to shew on the face of this rule, that it has been drawn up on reading the documents, which, according to the practice of the Court, are made the foundation of that rule? I can entertain no doubt upon the point. I think that it is not sufficient to draw up this rule, merely on reading the dropped rule nisi, of Trinity Term last. The present rule, must, therefore, be discharged.

Butt contended, that the rule ought to be discharged with costs: for, it was expressly sworn, that an action had been brought for the recovery of the same sum as that for which the present rule for an attachment was obtained. That action was pending at the time the demand supporting this rule was made. The writ was issued on the 19th of June, and the demand was made on the 1st of July. He cited the case of *Higgins v. Willes* (a). That case shewed that the Court viewed the conduct of a party bringing an action on an award, and applying for an attachment during its pendency, as exceedingly improper.

1811.

BAKER

v.

WELLS.

Mellor cited the case of *Paull v. Paull* (b), where it was held, that an attachment for a non-performance of an award would not be granted, if an action has been commenced, except on the terms of discontinuing the action, and paying the costs. That case might be an authority to shew that the Court would not grant an attachment without discontinuing the action, but was no authority to prove that if the rule was obtained for an attachment, it would be discharged with costs (c).

Cur. adv. ult.

WILLIAMS, J.—It appears to me, that as there were two irregularities in this case on the part of the person applying, one, in not bringing the documents properly before the Court; and the other, in bringing an action for the same cause, and during its pendency making the demand supporting this rule, and it does not appear that that action has been discontinued, the rule must be discharged, with costs.

Rule discharged, with costs.

(a) 3 M. & R. 382.

& P. 81 where the Court refused

(b) *Ante*, vol. 2, p. 340.

to grant an attachment on an

(c) See *Badley v. Loveday*, 1 B.

award, pending an action on it.



1841.

Where negotiations for the settlement of an action have proceeded, until it is too late for a plaintiff to give notice of trial, according to the practice of the Court, and the defendant obtains a rule for judgment as in case of a nonsuit, the Court will discharge the rule with costs.

ALFORD v. FELLOWES.

BUTT shewed cause against a rule nisi, obtained by *Taprel*, which called upon the plaintiff to shew cause, why judgment as in case of a nonsuit should not be signed. It was a country cause, and issue was joined in sufficient time to give notice of trial for the last summer assizes. No notice of trial, however, was given. In answer to the application, an affidavit was produced, in which it was sworn, that the reason why the plaintiff did not give notice of trial at those assizes, was, that a negociation had been commenced between the plaintiff and the defendant, for the settlement of the cause, and that negociation could not be considered as having finally failed, until the month of December last. It was, therefore, impossible, under such circumstances, for the plaintiff to proceed to trial, according to the course and practice of the Court. Under these circumstances, it was submitted, that as the defendant was a party to the negotiation, and was, therefore, aware that the plaintiff could not proceed to trial at the last Summer Assizes, the present rule ought not to have been obtained for judgment as in case of a nonsuit.

Taprel, in support of the rule, contended, that the facts stated in the affidavit read, might be a sufficient ground for discharging the rule on a peremptory undertaking, because a sufficient excuse was furnished for not proceeding to trial, but could be no ground for discharging the rule absolutely.

WILLIAMS, J.—The question is, whether what occurred between the parties is not only an excuse for not proceeding to trial, but whether it would render any proceeding on the part of the plaintiff contrary to good faith, supposing he had proceeded to trial? It seems to me, that the attempt to arrange the matter by means of negociation, would have

been an excuse to the defendant for not appearing at the trial. If, then, the plaintiff could not, under the circumstances, have proceeded to trial, without committing a breach of faith, it appears to me that the defendant was wrong in obtaining this rule. The present rule, therefore, must be discharged, and with costs.

1841.
ALFORD
v.
FELLOWS.

Rule discharged, with costs.

WYATT v. NICHOLLS.

MONTAGUE SMITH shewed cause against a rule nisi, obtained by *Udall*, for enlarging, for four months, a peremptory undertaking given by the plaintiff. It was an action for the recovery of a sum of 7*l.* 8*s.* 11*d.*, and a writ of trial had been obtained to try the issue before the under sheriff. The debt was incurred in the month of June, 1832, and the present action was brought at the beginning of the year 1838. The plaintiff not having proceeded to trial according to the course and practice of the Court, a rule nisi, for judgment as in case of a nonsuit was obtained. That rule was discharged, on the plaintiff giving a peremptory undertaking to try the cause in two months. The excuse made for not proceeding to trial before, was the lunacy of a material witness. On the same ground, it was sought to support the present application, to enlarge the peremptory undertaking for four months. This, it was submitted, was no ground for enlarging the peremptory undertaking; as it being impossible to ascertain when the witness in question would cease to be a lunatic, the peremptory undertaking might be enlarged for an unlimited period. The Court would not allow such delay on the part of the plaintiff.

The Court will, under certain circumstances, and on payment of costs, permit a plaintiff to enlarge, by the period of four months, the time for fulfilling a peremptory undertaking.

Udall, in support of the rule, contended, that the application was reasonable. The cause of the plaintiff's not

1841.

WYATT

v.

NICHOLLS.

proceeding to trial, did not proceed from any fault of the plaintiff, but from the act of God. The period, for which it was proposed to enlarge the peremptory undertaking, was not excessive; and if the defendant was anxious to try sooner than before the lapse of four months, he might take down the record by proviso.

WILLIAMS, J.—I think the peremptory undertaking must be enlarged for four months, the plaintiff paying the costs of the application.

Rule absolute accordingly.

GOODMAN v. TREVANION.

What is sufficient proof that a defendant is alive, so as to authorise the signing of a judgment on an old warrant of attorney.

KNOWLES moved for leave to sign judgment on an old warrant of attorney. The question was, whether sufficient proof was given that the defendant was still alive. The affidavit on which the application was founded, stated, that the deponent had seen the defendant within six months; that the defendant's attorney had stated to the deponent that his client was living near Bruges; that the deponent, on the 24th of December, called on the defendant's attorney, and that the attorney told him, that he had received a letter from the defendant on the 21st, which information the deponent believed to be true; that the attorney shewed deponent a letter as the one which he had received; that the deponent was acquainted with the handwriting of the defendant, and that he believed the letter to be in his handwriting.

WILLIAMS, J.—I think that is sufficient proof that the defendant is alive. You may, therefore, take your rule.

Rule granted.

1841.

BOUCHER v. ROE.

ADDISON moved for a rule to shew cause, why the declaration, in this case, and all subsequent proceedings should not be set aside for irregularity. The defendant was in custody of the Marshal, at the suit of a third person. While in such custody, the present plaintiff served him with a writ of summons, and afterwards with notice of declaration, instead of the declaration itself. It was contended, that the declaration ought to have been served, and not filed, and notice given, as the prisoner was in custody.

A plaintiff may *file* his declaration, and serve notice thereof on a defendant who is in custody at the suit of a third person, and is not bound to *deliver* his declaration.

WILLIAMS, J.—There is nothing whatever to prevent a plaintiff from proceeding in the ordinary mode against a defendant, though at the time he happens to be in prison at the suit of a third person. The case might be different, if he was in custody at the suit of the plaintiff. You will, therefore, take no rule.

Rule refused.

FRIDEN v. BRAY.

WALLINGER moved for the costs of the day, in this case, for not proceeding to trial pursuant to notice. He was instructed to move that the rule should be drawn up with a stay of proceedings.

The Court will not grant a rule for the costs of the day, with a stay of proceedings.

WILLIAMS, J.—That is a term which cannot be introduced into the rule. You may have the rule absolute in the first instance for the costs of the day.

Rule accordingly.

1841.

A warrant of attorney given by an attorney to induce a party to stay proceedings against him on a rule for striking him off the roll, is illegal and void, and the Court will direct it to be taken off the file and cancelled.

KIRWAN v. GOODMAN.

WHATELY shewed cause against a rule nisi, obtained by *Thesiger*, for taking a warrant of attorney given by the defendant off the file, and cancelling it, on the ground that the consideration on which it was founded was illegal. It appeared, by the affidavits, that the plaintiff, Mrs. Kirwan, had employed the defendant as her attorney. In the course of this employment, he so far misconducted himself, that a rule was granted, requiring him to shew cause, why he should not be struck off the roll of attorneys of this Court. While this rule was pending, Goodman applied to Mrs. Kirwan, to induce her not to prosecute her rule any further. In order to induce her to accede to his proposal, he offered her the warrant of attorney in question, which secured the payment of a considerable sum of money; this offer was accepted. The money was to be paid within a certain time. Not being so paid, Mrs. Kirwan became urgent for the liquidation of her claim. Goodman then obtained the present rule, to set aside the warrant of attorney, on the ground that the consideration on which it was founded was illegal. It was submitted, that the Court would not yield to such an application on the part of a person who had so improperly and unprofessionally conducted himself.

Thesiger, in support of the rule, cited the case of *Collins v. Blantern* (a). That was an action of debt on a bond for 700*l.*; to the declaration, the defendant pleaded, that a person named John Rudge, had indicted two of the obligors and three others for perjury; that Rudge, the plaintiff, and the five indicted persons agreed that the plaintiff should give Rudge his note for 350*l.* in consideration of his not appearing to give evidence on the trial of the indict-

(a) 2 Wils. 341.

ment for perjury, and that the obligors should give their bonds to the plaintiff as an indemnity for giving the note; that the note and the bond were respectively given for the illegal consideration mentioned. On demurrer to this plea, it was held, that the bond was void at common law. In *Pool v. Bousfield* (a), an agreement was made between the payee of a bill of exchange and the drawer, that he would not enforce payment of the whole amount of the bill, payable by the acceptor, provided the drawer would not move the Court of King's Bench against the payee, who was an attorney, for the purpose of requiring him to answer the matters of an affidavit. In an action by the payee against the acceptor, this agreement being proved, Lord *Ellenborough* held the agreement to be corrupt and invalid, and, therefore, no discharge of the acceptor. On these authorities, it was contended, that the warrant of attorney in question was invalid, and, therefore, ought to be set aside, in accordance with the prayer of the rule.

1841.
 KIRWAN
 v.
 GOODMAN.

Cur. adv. vult.

WILLIAMS, J.—'This case has been brought before me, on affidavits, certainly of an enormous length, which set forth the transaction between the parties during a great number of years. The result of them is, that this warrant of attorney was given, in order to induce Mrs. Kirwan to drop her proceedings on a rule to strike Goodman off the roll. The case does not go so far as that of *Collins v. Blantern*, but comes within the principle of *Pool v. Bousfield*. The result of these authorities is, that it is contrary to the policy of the law that such a consideration should be allowed to prevail. If the attorney had misconducted himself in his professional capacity, and an inquiry was commenced, it ought to proceed. A warrant of attorney given for the

(a) 1 Camp. 55.

1841.

KIRWAN
v.
GOODMAN.

express purpose of stifling inquiry, it seems to me, cannot be allowed to stand. The present rule must, therefore, be made absolute.

Rule absolute.

MUNK v. CASS.

If the sheriff returns that the premises of the defendant are so barricaded, that he is unable to ascertain whether the defendant has goods within the bailiwick, on which a levy may be made, it is a bad return, as he should state either that the defendant has goods, or that he has none.

PLATT shewed cause against a rule nisi, obtained by *Warren*, calling on the sheriff of Hertfordshire to shew cause, why the return to a writ of fieri facias, in this case, should not be set aside. The affidavit, on which the rule was obtained, stated, that a writ of fieri facias had issued in this cause, directed to the sheriff of Hertfordshire, the service of the rule to return the writ, and the return itself. The substance of that return was, that the sheriff's officer, Horatio Drummond, had gone to the premises of the defendant, and found them barricaded and fastened up so as to be inaccessible down to the time of making the return, by reason of which the sheriff was unable to say whether Cass, the defendant, had any goods whereon a levy might be made; that the sheriff could not find that Cass had any other residence wherein any property of which he was possessed could be found. *Platt* submitted, that this return was sufficient, as it furnished a sufficient excuse to the sheriff for not executing the writ. The affidavit, in answer to the application, was, that the writ of fieri facias had been sued out on the 2nd of November. On the 3rd of November, the sheriff made out his warrant to Horatio Drummond, his officer, the warrant being indorsed to levy 173*l.*; that the officer being of a peculiar appearance, and well known at Ware, at which place the defendant resided, sent his follower to the dwelling-house of the defendant, in order to obtain admission. This he found impossible. Efforts were made for this purpose down to the 16th of November. On that day, similar efforts were made, the first thing in the morning and the last thing at night. [*Williams, J.*—The

sheriff does not say positively, that there are bona or nulla bona.] The sheriff could not make any other return. He had no right to break open the outer door, in order to ascertain whether there were goods on which he might levy; and if he did, he would be liable to an action at the instance of the defendant, and he could not return nulla bona, because he would be liable, if there were any goods on which a levy might be made, to an action for a false return. The real fact appeared from the affidavit, which was, that the defendant was dead, and, therefore, it was quite clear that this application was only an attempt to obtain payment from the sheriff of that debt which might be enforced against the estate of the defendant. The reason of the attempt was, that it was doubtful whether the estate would turn out to be solvent.

1841.

MUNK

v.

CASS.

Warren, in support of the rule, was stopped by the Court.

WILLIAMS, J.—No instance has been shewn to me in which it has been held, that the sheriff can make such a return as this. No doubt he is in a situation of difficulty. That, however, is not a case of novelty, as the sheriff is often placed in positions of difficulty, out of which he must get as well as he can. The case has been argued on the part of the sheriff as if an interference had taken place with his exertions on the part of the Queen's enemies. He must either return that there are no goods to take, or he must take them. The present rule will be absolute with costs, and a week's time may be given to the sheriff to amend his return.

Rule accordingly.

1841.

PRICE v. PRICE.

The Court will not set aside the certificate of an arbitrator any more than an award, on the ground of a mistake as to the effect of evidence.

V. LEE moved for a rule to shew cause why the certificate of the arbitrator in this case should not be set aside, on the ground that he had clearly committed a mistake, in the conclusion which he had drawn from the documents presented to him. The cause had been called on and had proceeded some way, when it appeared that the issue between the parties depended on a matter of account. It was then suggested, that it should be referred to a gentleman at the Bar. The suggestion was adopted, and it was agreed, in order to avoid expense, that he should give a certificate instead of making an award. The parties appeared before him, and the plaintiff having proved his case, the defendant produced certain receipts, which applied to other matters than those for which the plaintiff claimed. The arbitrator, however, misunderstood the effect of the receipts, and certified that the plaintiff had no cause of action. This conclusion was clearly a mistake, and was quite contrary to the evidence in the cause. The object of the present application was to set aside that certificate. No doubt the general rule was with respect to awards, that where an arbitrator had made a mistake as to the merits of the case, the parties were still bound by his decision. The case of a certificate, however, it was submitted, differed from that of an award. In an award, the arbitrator pronounced both on the law and the evidence, and, therefore, assumed the situation of both judge and jury. In the case of a certificate, however, he was merely put in the situation of the jury. His decision, therefore, as to the facts, must be liable to revision, in the same manner as the verdict of a jury. If the jury gave a verdict against evidence, the Court would correct their error; the arbitrator being placed in the same situation as the jury, when he gave a certificate, his erroneous decision must be equally liable to correction.

WILLIAMS, J.—The matter in question has been referred to an arbitrator, who is a judge chosen by the parties themselves. They must, therefore, abide by his decision, although he may have made a mistake. That has been clearly determined in a variety of cases. There is no distinction between a certificate and an award, and, therefore, the parties must abide by the decision of the arbitrator so pronounced. You will, therefore, take no rule.

1841.

PRICE

v.

PRICE.

Rule refused.

WORTHAM v. TUCK.

OGLE moved to make absolute a rule for entering up judgment on an old warrant of attorney. The affidavit on which he applied, was made by the clerk of the plaintiff's attorney. The deponent stated, that he had gone to the defendant's usual place of residence, where he lodged. He had there made inquiries as to when the defendant was likely to be at home. The landlady of the house stated, that the defendant was somewhere in London, but that she did not know where, nor did she know when he would be back again. The affidavit also stated, that the defendant had neither wife, nor child, nor servant, nor attorney on whom the rule could otherwise be served. The rule nisi had been left with the landlady. Under these circumstances, it was urged, that sufficient had been done to entitle the plaintiff to make the rule nisi absolute.

The Court will, under special circumstances, allow a rule to be made absolute on an old warrant of attorney, where the service has been effected on the landlady of the house in which the defendant lodges.

COLERIDGE, J.—You may take the rule absolute, but do not issue execution, until after the expiration of a week.

Rule absolute accordingly.

1841.

DOE d. GINGER v. ROE.

Service of a declaration in ejectment on a servant of the tenant on the premises, is insufficient, although the deponent serving it, subsequently converses with the tenant, and explains the nature of the declaration.

HEATON moved for leave to sign judgment against the casual ejector. The affidavit on which he applied, stated a service of the declaration on a servant of the tenant in possession on the premises; that the deponent had afterwards seen the tenant in possession, and conversed with him on the subject of the action, and explained to him the nature of the declaration, but in the course of the conversation, no statement was made by the tenant, that the declaration had come to his hands. He cited *Doe d. Messer v. Roe (a)*, where it was held, that service on the servant of the tenant in possession, she stating her mistress to be too ill to be seen, and that she had given the declaration to her mistress, is sufficient for a rule nisi for judgment against the casual ejector. This service, it was submitted, was sufficient, if not for a rule absolute, for a rule nisi.

WILLIAMS, J.—I think that as there is no admission on the part of the tenant in possession, that the declaration has been received by him, there ought to be no rule.

Rule refused.

(a) *Ante*, vol. 5, p. 716

Ex parte GRAY.

Where an attorney applies to be struck off the roll at his own request, he must not only swear, that no proceedings are pending against him, but also, that he expects none.

LEAHY moved to strike an attorney off the roll, at his own request. The affidavit, on which he moved, stated that no proceedings were pending against the applicant, but did not proceed to swear that he expected none.

WILLIAMS, J.—That is not sufficient; he ought to swear that he expects no proceedings against him.

Application refused,

1841.

BLACKBURN v. GODRICK.

W. H. WATSON moved for a rule to shew cause, why the plaintiff in this case should not be at liberty to enter up judgment against the defendant nunc pro tunc. The defendant had given a cognovit to secure the payment of a certain sum by instalments, each instalment to be paid at periods of six months each. The first instalment became due in the month of May last, and was duly paid. The next instalment, according to the terms of the cognovit, became due on the 15th of November. Before the latter day arrived, the defendant died, but the plaintiff did not hear of the death until after the 15th of November. The affidavit stated that the instalment due on that day had not been paid. The question was, whether the Court would allow judgment nunc pro tunc to be signed on the cognovit? By 3 Reg. Gen., H. T., 4 Wm. 4, (Practice Rules)(a) it was ordered, that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to any other day." A proviso was however introduced into that rule, "that it shall be competent for the Court or a judge to order a judgment to be entered nunc pro tunc." The power of the Court, therefore, remained the same, to exercise its discretion with respect to ordering judgments to be entered up nunc pro tunc. In the case of *Calvert v. Tomlin*(b), where a cognovit was given on the 8th of February, in Hilary Term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing first of April, and the defendant died in Hilary Vacation, before the first of April, judgment entered up on the 10th of April in Hilary Vacation, after defendant's death was held regular, as relating to the first day of Hilary Term, as also execution

Where an instalment on a cognovit became due, after the death of a defendant, the Court refused to allow judgment to be entered up on the cognovit nunc pro tunc.

(a) *Ante*, vol. 2, p. 313.

(b) 5 Bing. 1; 2 M. & P. 1.

1841.
BLACKBURN
v.
GODRICK.

tested of a day in that Term, anterior to the defendant's death. There, Lord *Wynford* said, "As the law stands at present, a cognovit is revoked by the death of the party, although it is difficult to find a satisfactory reason for this, since the party has nothing more to do after giving the cognovit, which distinguishes it from the case of a submission to an award. The Courts, however, have allowed a fiction to prevail for the furtherance of justice, and in *Bragner v. Langmead* (a), it was decided, that a judgment signed in any part of the Term or subsequent Vacation, relates back to the first day of the Term, notwithstanding the death of the defendant before judgment actually signed; and that an execution against the goods of the defendant might be taken out upon it, tested the first day of the Term" (b). That was an authority in support of the present application. Again, in many cases, where a delay took place in the proceedings of the plaintiff, in consequence of delay on the part of the Court, it was usual to allow judgment to be signed nunc pro tunc. The case might, in fact, be compared to that of a verdict found in favour of a party, and the opposite party died between verdict and judgment. In such a case, by the 17 Car. 2, c. 8, s. 1, the judgment might be signed within two Terms after the verdict. Here, the application to sign judgment was made within two Terms after the instalment became due, which might be considered as equivalent to a verdict.

WILLIAMS, J.—I have no difficulty in deciding this case. I have clearly no power to grant the application. In the case cited, Lord *Wynford* allowed a fiction of law to prevail, by which, a judgment related to the first day of the Term, in which, or in the Vacation of which, it was signed. This is, however, a very different case. The principles on which the Court have allowed judgments to be entered up nunc pro tunc does not apply. This is neither a case where a

(a) 7 T. R. 20.

(b) See *Berger v. Green*, 1 M. & Sel. 229.

verdict has been found during the life of the defendant, nor has there been any delay on the part of the Court.

1841.
 BLACKBURN
 v.
 GODRICK.

Rule refused.

HILL v. SLOCOMBE.

V. WILLIAMS applied to the Court for its direction to the proper officer, to draw up a rule for an attachment for the non-performance of an award. On inspecting the award, the officer observed that it was unstamped. He, therefore, declined drawing up the rule, without the direction of the Court for that purpose. It was submitted, that the officer had no right to take the objection. The party applying for the attachment had taken his chance that no objection would be made by the opposite party, on the ground of a defect of stamp, and if he did not take the objection, it was not competent for the officer to take it. At *Nisi Prius*, a judge trying a cause, would not take the objection. If the judge would not, how could the officer? But if the officer was allowed to enter into the question as to whether the instrument was duly stamped, he might also object to the amount of the stamp. If he did, how would it be possible to shew cause against his objection, or how could the question be argued? It had been suggested that the officers of the Court were bound to take notice of the absence of stamps, when stamps were required on legal proceedings. That, however, was a very different case. The Court would be bound, as a matter of course, to take notice of its own proceedings, and to see that they were in the legal form. But the proceedings on an award were very different, as they were merely incidental to the proceedings of the Court. Besides, the award, on which the present attachment was moved, might be a duplicate of the award, when, of course, no stamp on it would be required. The presumption was, that the award was such a one as

Where it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the Court to object to the absence of a stamp on the award, and, therefore, to refuse to draw up the rule.

1841.
 HILL
 v.
 ST. COMBE.

would be legal, although no stamp was upon it. If so, then this award would be presumed to be a duplicate, until the contrary be shewn by the opposite party.

Cur. adv. vult.

WILLIAMS, J.—I have spoken to the other judges on this case, and have stated the arguments urged in support of the application, and more especially that with respect to the practice of a judge at Nisi Prius not taking notice of the absence of a stamp, unless the defect is pointed out by the opposite party. They think that the state of the documents being mentioned by the officer of the Court, when the documents are handed in, is equivalent to an intimation, which compels them to consider whether the documents are in a state to authorize the drawing up of the rule. We are all of opinion that it was not in such a state. The rule for an attachment, therefore, cannot be drawn up on this award, which is unstamped.

Application refused.



Doe dem. SMART v. ROE

A notice at the foot of a declaration in ejectment, directed to "R. Newton," and served on "R. A. Newton" is sufficient, if it is sworn that the latter is the person intended.

W. H. WATSON applied for leave to sign judgment against the casual ejector. The peculiarity of the case was, that the notice at the foot of the declaration was addressed to Robert Newton, and when the service was effected on the tenant in possession, it was discovered that his name was Roberth Alworth Newton. It was sworn, however, that the tenant on whom the declaration was served, was the person intended.

WILLIAMS, J.—That, I think, is a sufficient service.

Rule granted.

1841.

ARCHER v. OWEN.

INGHAM shewed cause against a rule nisi, obtained by *Wightman*, which called upon the plaintiff to shew cause, why the award in this case should not be set aside on various grounds. The principal one was, that the award was uncertain. It was an action of trespass, and the defendant pleaded, first, not guilty; secondly, a justification. The cause came on for trial, and being referred, a verdict was taken in favour of the plaintiff, subject to a reference. The arbitrator held several meetings, and subsequently made his award. No power was reserved to the arbitrator to raise any question for the opinion of the Court. By the award, the arbitrator found, "that as the defendant has not proved his plea, the verdict ought to stand." The arbitrator then proceeded to set forth the reasons which induced him to come to the conclusion he had. Those reasons were not satisfactory. He did not set forth the evidence which had been adduced before him. *Ingham* contended, that the award was sufficiently certain. The arbitrator had not found in direct terms that the trespass had been proved by the plaintiff, but he found that which must be considered as equivalent to such a finding; it was not to be presumed that the arbitrator would be so unjust as to determine that the defendant could be required to shew a justification for a trespass which had not been committed. It was enough if sufficient appeared on the face of the award to shew that the arbitrator had adjudicated on the cause referred to him. In the case of *Hunt v. Hunt* (a), it was held, that where several issues are referred to an arbitrator, it is not indispensably necessary for him to award on each issue, if his intention as to each of them is sufficiently clear from the general language of the award. That was the decision of Mr. Justice Patteson. Then, as

An action of trespass was referred by order of nisi prius. The defendant pleaded, first, not guilty, and secondly, a justification. The arbitrator awarded "that as the defendant has not proved his plea, the verdict for the plaintiff ought to stand," and then stated a number of reasons for his opinion, which could not be considered as satisfactory. The Court held the adjudication sufficient, and declined to consider the sufficiency of the reason assigned by the arbitrator.

(a) *Ante*, vol. 5, p. 442.

1841.

ARCHER

v.

OWEN.

to the objection, that the arbitrator has given unsatisfactory reasons for the decision which he has pronounced. [*Cole-ridge, J.*—Suppose he states his reasons, which are insufficient, the parties have made him their judge]. No power was reserved to the arbitrator to raise any question for the opinion of the Court, nor had he raised any. He had merely stated his reasons, which he considered to be the result of the evidence, and was not the evidence itself. If he had stated the evidence and drawn his conclusion from it, unless his conclusion was manifestly wrong, there being no evidence whatever to justify the opinion he had formed, the Court would not interfere with the award. In *Barrett v. Wilson (a)*, the Court refused to set aside an award, on the ground that the arbitrator had come to a wrong conclusion on the facts, there being some evidence to support his finding, though the Court did not think the arbitrator right in his conclusion from the evidence. For these reasons, the award must be considered as sufficiently certain.

Wightman, in support of the rule, contended, that the award was too uncertain to be sustained. It did not appear, on the face of it, that the plaintiff's right of action had been *primâ facie* proved so as to require the plaintiff to go into proof in support of his plea. Then, the arbitrator having stated his reasons on the face of his award, the Court was at liberty to look at them, in order to determine on their sufficiency. No doubt an arbitrator was sole judge of the facts as well as the law in all cases referred to him. But that rule could only apply to those cases where the arbitrator had not stated the grounds on which he proceeded. Here, however, he had stated those grounds. The Court had, therefore, a right to examine whether they justified the decision which he had pronounced. If the award was examined, it would be observed that the arbitrator had decided first merely that as no sufficient evidence had been

(a) *Ante*, vol. 3, p. 220; S. C. 1 C., M. & R. p. 586.

produced in support of the plea, the verdict ought to stand, and then he proceeded to state a number of reasons for his award, which could have no effect on the conclusion at which he had arrived. On its face, therefore, the award must be considered as bad, and the present rule ought to be made absolute.

1841.

ARCHER

v.
OWEN.

COLERIDGE, J.—I have no right to set aside the award, because I may not be satisfied that the decision is quite correct. It is possible, from what appears on the face of the award, that the decision of the arbitrator may not be satisfactory. But what is here stated is not set forth as the full evidence in the cause, but the mere impression of the evidence which the arbitrator has received. It may be, however, that as to the merits, it is a satisfactory determination. I agree with the observation of Mr. Justice *Patteson*, that there is no necessity for a finding in express terms on the matters referred to the arbitrator; for, sometimes there are references to laymen, and their awards cannot be expected to be drawn up in a strict clerkly manner. It is enough if we see that the matter has come before the arbitrator, and been adjudicated upon. From the length of time which the premises in question had been occupied by the plaintiff, and the manner in which, and the persons by whom, it was occupied, the arbitrator might see that the trespass had been proved. It is quite consistent, therefore, for the arbitrator to say that the defendant had not produced any evidence in support of his plea, and, therefore, that the plaintiff was entitled to a decision in his favour. The defendant was bound to prove his plea, if the plaintiff proved the trespass. I think, therefore, that I must consider that an adjudication has been made by the arbitrator, and, therefore, the present rule must be discharged.

Rule discharged.

1841.

Where the sheriff returns non est inventus and nulla bona to a writ of distringas, and the defendant's wife on the premises informs the sheriff's officer, that she and her husband are living in furnished lodgings, and have nothing there or elsewhere, on which to execute the writ, the Court will allow an appearance to be entered for the defendant.

THOMSON v. FURNEY.

WARREN applied for leave to enter an appearance for the defendant, after a return by the sheriff of non est inventus and nulla bona to a writ of distringas. In addition to the return of the sheriff, an affidavit had been made by the officer, in which he stated, that he had gone to the premises of the defendant for the purpose of executing the writ, and had there seen the wife of the defendant. She informed him, that her husband and she were residing in furnished lodgings, and that they had nothing there on which the officer could distrain, nor had he any goods elsewhere that could be distrained? The question was, whether this was sufficient to entitle the plaintiff to enter an appearance for the defendant? In the case of *Cornish v. King* (a), it was held, that where the defendant resides in ready furnished lodgings, the Court will not allow an appearance to be entered for him upon a return of nulla bona and non est investus to a distringas, unless it is sworn that the defendant has no goods on which the sheriff can levy. Here, it was not positively sworn that the defendant had no goods elsewhere, on which a levy might be made, but it was submitted, that as the wife of the defendant had stated that fact, the case was distinguishable from that of *Cornish v. King*, and was, therefore, sufficient to authorize the plaintiff in entering an appearance for the defendant.

WILLIAMS, J.—I think, under the circumstances, it is sufficient.

Rule granted.

(a) *Ante*, vol. 2, p. 18.

1841.

EIFFE v. JACOB.

HEATON moved to discharge the defendant in this case out of custody, pursuant to the 48 Geo. 3, c. 123, he having lain in prison twelve successive calendar months.

Bayley shewed cause against the application in the first instance, notice having been served pursuant to 1 Reg. Gen., H. T., 2 Wm. 4, s. 90 (a). The objection to the application was, that the defendant had not been in actual custody throughout the twelve calendar months, but during a great portion of that time he had enjoyed the benefit of the rules. He cited *Sumption v. Monzani* (b), *Gilbert v. Pope* (c), *Barnard v. Symonds* (d). In those cases, the Court had held, that in order to entitle a defendant to the benefit of 48 Geo. 3, c. 123, he must be *actually* in custody within the walls of the prison. On the authority of those cases, it was submitted, that the defendant could not be discharged.

In order to entitle a defendant to the benefit of the 48 Geo. 3, c. 123, the Small Debtors' Act, he must remain in *actual* custody during twelve successive calendar months; if he enjoys the privilege of the rules during any part of that period, he is disentitled to that benefit.

Heaton, in support of the application, submitted, that the decision, at which the Court would arrive, must depend on the words of the act of Parliament, under which the present application was made. Those words did not require that the defendant should remain in actual close custody during the period of twelve successive calendar months, but merely that he should "have lain in prison." Those words must mean "prison" in the ordinary sense. A person might be said to be in prison when he was restrained of his liberty, and the defendant must be considered to be restrained of his liberty, if he was compelled to remain within the rules of the prison, as much in a legal sense, as if he was confined within four walls. No doubt the

(a) *Ante*, vol. 1, p. 195.(c) *Ante*, vol. 5, p. 449.

(b) 2 M. & W. 311, (note); 4

(d) *Ante*, vol. 5, p. 520.

Ad. & El. 1007.

1841.

EIFFE

v.
JACOB.

decisions cited had been pronounced ; but, the words of the act of Parliament did not appear to have been brought, in those cases, before the attention of the Court. In the case of *Boughey v. Webb* (a), it was held, that a defendant was entitled to his discharge, under 48 Geo. 3, c. 123, although he had been out occasionally on day rules during the twelve months. That decision was in conformity with the argument now sought to be enforced. If the defendant's right to be discharged remained the same, after he had been occasionally absent from custody on day rules, it was difficult to see how the fact of his having enjoyed the rules of the prison during a portion of the twelve months, could interfere with his right to avail himself of the act of Parliament.

WILLIAMS, J.—It seems to me, on the authority of *Sumption v. Monzani*, that the defendant is not entitled to his discharge. But, independent of the authorities, I think, on the words of the act of Parliament itself, I should come to the same conclusion. It is true that in the earlier part of the section it speaks of defendant's being "in execution," and, therefore, those words might embrace an instance, in which a defendant had the benefit of the rules. It afterwards, however, speaks of the defendant having "lain in prison." I think the clear meaning of those words is, that in order to entitle a party to the benefit of the statute, he must have been, during the successive twelve calendar months, in actual custody. That does not appear to have been the case with this defendant, for two places are mentioned in which he has been living within the rules. The present application must, therefore, be refused.

Application refused.

(a) *Ante*, vol. 4, p. 320.

1841.

Doe dem BROOK v. ROE.

CLARKSON moved for leave to sign judgment against the casual ejector. The only difficulty in the case was, that the declaration was entitled "Hilary Term, 4 Vict." The notice, however, was dated on the 7th of January, 1841, and required the tenant to appear in the next Term. It was submitted, that any difficulty which might have arisen from the entitling of the declaration, was completely removed by the date attached to the notice. In consequence of that, the tenant could not be misled as to the time within which he was bound to appear.

If a declaration in ejectment, is intitled "Hilary Term, 4 Vict." but the notice at the foot, which is dated the 7th of January, 1841, requires the tenant to appear in the next Term, it is sufficient.

WILLIAMS, J.—I think that the service is sufficient.

Rule granted.

SWAINE v. STEPHEN SPENCER.

LUTWYCHE moved for a rule to shew cause, calling on the plaintiff in this action, to pay to Robert Spencer certain costs incurred in consequence of an application made by the sheriff under the Interpleader Acts 1 & 2 Wm. 4, c. 58, s. 6, and 1 & 2 Vict. c. 45, s. 2, under these circumstances. The plaintiff in the action having obtained judgment against the defendant, whose name was Stephen Spencer, sued out execution against his goods. The sheriff accordingly, under the writ of fieri facias, seized certain goods, and while in possession, Charles Spencer, the brother of the defendant, laid claim to those goods. The sheriff accordingly applied under the Interpleader Act to a Judge at Chambers. The plaintiff and the claimant attended accordingly at the Chambers.

Where an application has been made to a judge at Chambers, under the 1 & 2 Wm. 4, c. 58, s. 6, and the 1 & 2 Vict. c. 45, s. 2, the Interpleader Acts, and the parties do not go before the judge at the instance of the execution creditor, and he, having made inquiries, abandons his execution, the

Court will not grant summarily to the claimant, the costs of attending at the judge's Chambers, but will leave him to his action.

1841.

SWAINE

v.

STEPHEN
SPENCER.

The plaintiff's attorney then, in conjunction with the agent of the under-sheriff, requested that previous to going before the Judge, time should be allowed to make inquiries as to the validity of Charles Spencer's claim. To this the attorney for Charles Spencer acceded. Inquiries were subsequently made, and they appearing to be satisfactory, the plaintiff ultimately abandoned his execution, and the sheriff gave up possession of the goods. The object of the present application was, that the execution creditor might pay to the claimant the costs of attending the summons under the Interpleader Act. Those costs were caused by the improper seizure of Charles Spencer's goods by the sheriff, at the instance of the plaintiff. The learned Judge had made no order on the point as to these costs, and, therefore, the only means in the power of the claimant of obtaining them were to make the present application. [*Coleridge, J.*—Charles Spencer may bring an action against the sheriff]. If Charles Spencer brought an action against the sheriff, it would be said that the sheriff would have been relieved under the Interpleader Act, if he had gone before the Judge. In the case of *Beswick v. Thomas (a)*, Lord *Abinger* said that the execution creditor must pay the adverse claimant's costs when the execution creditor did not appear. Again, in *Bryant v. Ikey (b)*, it was held, that if the execution creditor does not appear to support his *fi. fa.*, the Court will grant the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor.

COLERIDGE, J.—In all those cases, the rule had come on for discussion before the Court. Here, the case did not come before the Judge for discussion. I cannot distinguish this case from all others in which a party makes an application at Chambers, and then abandons it without any order being made. How does this come within the meaning of the act of Parliament? I think this rule ought not

(a) *Ante*, vol. 5, p. 458.(b) *Ante*, vol. 1, p. 428.

to be granted. I am afraid of the consequences of granting it, on account of the great numbers of similar applications which would result. It seems, according to the statement made, that the sheriff having received a writ of fieri facias against the goods of A., seized the goods of B. Upon this, B. claims the goods, and the sheriff takes out a summons to bring the parties before the Judge, under the Interpleader Act. All the parties attend at the Chambers of the Judge, but at the request of the sheriff and of the execution creditor, they do not go before the Judge. Time is given to make inquiries, whether the claim made by Charles Spencer is valid. Inquiries are made, and it is found that the execution is wrong. Then what is the result? There is a ground of action against the sheriff, and if the claimant can connect the plaintiff in the action with the sheriff, he may bring an action against him also. Instead of doing so, the claimant applies to this Court for the costs incurred in attending the summons under the Interpleader Act. I think the present rule cannot be granted.

1841.

SWAINE

v.

STEPHEN
SPENCER.

Rule refused.

SLATER v. BROOKES.

PEACOCK shewed cause against a rule nisi, obtained by *Crompton*, calling on the defendant to shew cause, why the bills of costs mentioned in his particulars of set-off, should not be taxed. The present was an action of assumpsit, to which the defendant, who was an attorney and solicitor, pleaded, first, payment into Court of 248*l.*; secondly, non-assumpsit, as to the residue of the plaintiff's demand; and, thirdly, a set-off of certain bills of costs for business done in Equity, by the defendant for the plaintiff. The amount of the bills was 756*l.* In those bills, no item was contained for any matter transacted out of the Court of

Where an action is brought against an attorney, and he pleads a set-off of his bill for business done in Equity only, the Court will not direct his bill to be taxed.

1841.

SLATER
v.
BROOKES.

Equity. *Peacock* submitted, that this Court had no jurisdiction to direct such a bill to be taxed. The only jurisdiction which the Court could exercise for taxing an attorney's bill was derived from the 2 Geo. 2, c. 23. That appeared from the case of *Clutterbuck v. Combes* (a). In *Ex parte King* (b), it was held, that the Court has no power to order the bill of an attorney to be taxed, unless it appears that some part of the business was done in the Court, to which application for the order is made.

Crompton admitted that the only authority of the Court to tax was derived from the statute, but in the case of *Williams v. Griffith* (c), the Court held, that after action brought upon an attorney's bill, containing any taxable item, it would refer a bill for taxation, without requiring the usual undertaking to pay the amount which might be found to be due.

Peacock distinguished that case from the present, as there, taxable items were introduced into the bill; here, however, no taxable items existed, as all the items were of the Court of Equity. In this case it was to be remembered, that the attorney was not bringing an action for the recovery of his bill, but was merely seeking, by means of it, to meet a demand set up against him by the plaintiff. In the case of *Weymouth v. Knipe* (d), the Court held, that it had no power to refer an attorney's bill for taxation, independently of the 2 Geo. 2, c. 23; and as the 12 Geo. 2, c. 13, takes agents' bills out of the former statute, they cannot be referred for taxation, although a suit is pending for their amount. Under these circumstances, it was submitted, that the present rule ought to be discharged.

Crompton supported the rule, and contended, that the

(a) 5 B. & Ad. 400; 2 Nev. & Man. 209. (c) *Ante*, vol. 8, p. 414.

(b) 3 N. & M. 437.

(d) *Ante*, vol. 5, p. 495.

present case came within the principle laid down by the Court, in *Williams v. Griffiths*. The pendency of an action with respect to the attorney's bill, must be considered as giving the Court jurisdiction to direct it to be taxed. If this application was not successful, the plaintiff would be in considerable difficulty in the present state of the pleadings to determine how he should frame his replication, as the amount of the defendant's set-off was quite uncertain.

1841.
 SLATER
 v.
 BROOKES.

Cur. adv. vult.

COLERIDGE, J.—This was a rule to refer bills of costs, which the defendant, an attorney, had set-off against the plaintiff's demand, to taxation; it was admitted, that these bills contained no item of business done in this or any other Court of Law, but were composed entirely of charges for business done in Courts of Equity. It was not contended that I could have sent this bill for taxation, if no action had been brought, for the case is not within the words of the statute, and it is now settled, that the Courts have not any general common law jurisdiction to order the taxation of an attorney's bill; but it was said, the existence of the action and the attorney's setting the bill off in the action which was the same as if he was suing upon it, gave the Court jurisdiction. I am, however, of a contrary opinion; it appears to me, that no business having been done in this Court, and the bill containing no taxable item at law, it is the same in principle, as if the bill had been wholly for conveyancing, or wholly for work done before a committee of the House of Commons, or any other untaxable matter. When a bill contains even a single item for business done in the Court, it has become the inveterate practice, not very reconcileable with the language of the statute, to refer it for taxation throughout to the officer of our Court, though the residue of the work charged for, may have been done in other Courts of common law, or in

1841.

SLATER
v.
BROOKES.

Chancery, and our officer then procures the assistance of the officers of other Courts, for the taxation, the whole taxation being, however, still to be considered as his. But in the present case, there is nothing on which the jurisdiction can attach. I agree that there is no distinction in this respect, between suing on the bill, and setting it off; in both cases, I apprehend the remedy is by an application to the Court of Equity, in which the business was done. The rule, therefore, will be discharged.

Rule discharged.

WILSON v. BLAKEY.

Where a defendant who is a marks-woman, applies for her discharge under the 48 Geo. 3, c. 123, it must appear in the jurat to her affidavit, supporting the application, that it has been marked by her.

HUMFREY moved to discharge the defendant out of custody, under the 48 Geo. 3, c. 123, the Small Debtors' Act. The question arose, as to whether the jurat of the defendant's affidavit was sufficient. It appeared that the defendant was a marks-woman; and the commissioner had not stated in the jurat, that the affidavit had been marked by the defendant. It was submitted that the jurat was sufficient, as it stated that the affidavit was read over to the defendant, and explained to her, and that she seemed to understand the nature of the affidavit.

WILLIAMS, J.—I am informed by the officer that the statement of the defendant having marked the affidavit, was necessary to be made in the jurat. The jurat may be amended, without re-swearing.

Rule refused.

1841.

ALSAGER v. CRISP.

COCKBURN shewed cause against a rule nisi, obtained by *Byles*, calling on the plaintiff to shew cause why the appearance, judgment, and execution in this case should not be set aside for irregularity, with costs. The irregularity complained of, was, that the plaintiff had improperly entered an appearance for the defendant. Under the circumstances, however, it was submitted, that the objection, although in itself a valid one, had been waived by the defendant's laches. The writ of summons had been issued on the 1st of December. The defendant, by attorney, entered an appearance for himself on the 7th of December, and on the 12th, the plaintiff entered an appearance for him. Notice of filing the declaration was served on the 17th, on the defendant in the country, he having appeared by attorney. On the 31st of December, judgment was signed for want of a plea, and on the 17th of January, the defendant was taken in execution. The defendant then, in the present Term, obtained this rule. After the delay, which this statement of the dates shewed, the defendant could not render the objection as to the improper entering of appearance by the plaintiff available. As soon as he was aware of the objection, as he must have been when the notice of the declaration was served on him, he was bound to apply to the Court promptly. Instead of acting in that manner, he allowed judgment by default to be signed. In *Chitty's Archbold's Practice*, p. 1047, it was laid down, "An irregularity in an appearance by the plaintiff for the defendant, must be taken advantage of before judgment by default." For this proposition the case of *Williams v. Strahan* (a), was cited. The marginal note of that case was, "If a defendant accept a declaration, and act as if an appearance has been entered for him, the Court will not

Where a defendant by his attorney entered an appearance, and the plaintiff afterwards entered one for him; filed a declaration, and served notice on the defendant in the country, the Court held that the objection to the plaintiff's proceedings made them irregular, and not null, and, therefore, the defendant was bound to come promptly to the Court, after the notice of declaration was served on him, as that gave him sufficient notice of the plaintiff's proceedings.

(a) 1 N. R. 309.

1841.

ALSAGER

v.
CRISP.

afterwards permit him to set aside the judgment for want of an appearance having been entered." That case was exactly in point. Here the defendant acted as if a regular appearance had been entered, either by him or for him, and, therefore, he could not now object to the proceedings of the plaintiff. The rule ought to be discharged.

Byles, in support of the rule, contended, that the defendant could not be considered as guilty of laches. It was said, that the defendant was bound to apply to the Court as soon as the notice of declaration was served on him. If that notice was a good one, it might be a ground for requiring the defendant to apply earlier to the Court, but as it was a mere nullity it could not. Service of a notice of declaration ought either to be on the defendant's attorney in the country, or if he had an agent, then on the agent in town. There was, in the present case, only service on the defendant himself in the country, although he had an attorney who had appeared for him. No notice of declaration, therefore, was in existence, as far the defendant was concerned. Being none, the previous objection could not be waived by the defendant. But the objection to the plaintiff's proceedings was, that it was a nullity, and the cases of *Roberts v. Spurr* (a) and *Hanson v. Shackelton* (b), were authorities to shew that a nullity could not be waived. In the former case it was held, that a judgment signed, where no appearance had been entered by or for a defendant, was a nullity, and could not be waived by the defendant's delay; and in the latter, that a writ of summons dated on a Sunday is a nullity, and the objection is not waived by lapse of time. The plaintiff had no right to file his declaration, he ought to have delivered it. If the notice of declaration in this had been a notice of trial, could it be said that such a service would have been sufficient to authorize the plaintiff to proceed upon it? If even the proceeding of the plaintiff

(a) *Ante*, vol. 3, p. 551.(b) *Ante*, vol. 4, p. 48.

was an irregularity, it could not be waived until knowledge of it was possessed by the defendant. No knowledge was possessed by means of this notice, and, therefore, it could not be said, that the defendant had been guilty of laches, and, consequently, he had not waived the irregularity.

1841.

ALSAGER

v.

CRISP.

Cur. ado. vult.

WILLIAMS, J.—This was a rule to set aside an appearance, and all subsequent proceedings for irregularity, with costs. The facts were these: On the 1st of December, the writ of summons was sued out, and on the 7th, the defendant, by his attorney, entered an appearance. On the 12th, the plaintiff's attorney entered an appearance for the defendant. That step was clearly irregular. On the 17th notice of declaration being filed, was served on the defendant personally in the country, and on the 31st final judgment was signed. On the 11th of January the defendant was taken in execution. The question comes, therefore, to this, whether the application is too late? Two points are made. On the one side, it is said, that the application is too late; on the other, that the proceedings must be considered as a nullity. In my opinion, the question resolves itself into the inquiry whether or not the personal service on the 17th of December, on a party residing in the country, and who, according to the facts, had an attorney residing in the country, is to be deemed no service at all, so as not to bring to his knowledge the previous proceedings, namely, the entry of an appearance on the 12th by the plaintiff's attorney, one having already been entered by defendant's attorney. Although it is quite true, that the service of process and the other proceedings in the cause may be sufficient, if served on the agent in London, yet the question is, whether a party, having an attorney in the country, and being resident there, a notice served on him is to be considered as no notice? I think it could not be considered so; and if it is not so, the objection as to entering the appearance being merely an

1841.

ALSAGER

v.
CRISP.

irregularity, it is perfectly clear that the objection is too late. The delay is accounted for, if dated from the execution; but if from the 17th December, it is to be considered that the defendant had notice of the plaintiff's proceedings, it is clear that the application is too late. Because, according to the good rule of all the Courts, when a party is proceeding to take advantage of an irregularity, he ought to appear and make his application promptly, in order to prevent expense from being incurred by the opposite party proceeding. But the objection is treated by Mr. *Byles* as shewing the plaintiff's proceedings to be only a nullity. I cannot assent to that view of the subject, because every thing was done perfectly well on one supposition, that the appearance had not already been entered by the defendant. It was a step wholly appropriate to proceedings in a cause where the facts would have allowed it. It seems to me, therefore, quite impossible to consider this as other than an irregularity. Then, treating the service of the notice of declaration on the defendant in the country as sufficient notice, I think the application should have been made sooner, and, therefore, the rule ought to be discharged.

Rule discharged.

 ROSS v. CLIFTON.

Where an arbitrator awards damages for an injury caused by the defendant to the plaintiff's property, by acts done in the adjacent property of the former, and then having power to direct the mode of

enjoying the property for the future, he awards that the parties shall respectively enjoy it as heretofore, the award is not final, and, therefore, bad.

WARREN shewed cause against a rule nisi, obtained by *Shae*, Serjt., for setting aside an award on certain grounds specified in the rule. The objections stated in the rule were, "That the said award is inconsistent, and contains no final decision on the matters submitted to the arbitrator, nor any directions as to the future enjoyment of the property." It was an action on the case, and the cause, as well as all matters in difference, were referred to a legal arbitrator, to determine

both the cause and the matters in difference; and it was further ordered, "That the arbitrator should have power to direct how the property in dispute should be enjoyed for the future." The arbitrator assumed the burthen of the reference, and in addition to the matters litigated in the cause, three claims to damages were made in respect of the alleged obstruction of a flue, the diversion of a water-spout, and the building over a water-course. The arbitrator, by his award, directed that the defendant should pay to the plaintiff damages to the amount of 30*l.* in respect of the last mentioned grounds of complaint. He then proceeded to direct, "that the parties shall continue to enjoy the property respectively as heretofore." To this award, the objections stated in the rule were made. Those objections must be considered as ranging under three heads; first, that the award is inconsistent; secondly, that it contains no final decision; thirdly, that there was no direction as to the future enjoyment of the property. A preliminary objection might be taken to this mode of stating the grounds of objection, which was, that it was far too vague. The grounds ought to be so specific as clearly to point out the particulars wherein the objections stated thus generally could be found. In *Allenby v. Proudlock* (a), the Court held, that it was too general to state a ground of objection, "That the arbitrator made his award under misapprehension of the terms of reference." In *Gray v. Leaf* (b), it was decided, that it was insufficient to state the grounds of objection, "that the award is not final, that the arbitrator had exceeded his authority, that the award is uncertain, or that the arbitrator has not awarded on all the matters referred to him." Again, in *Boodle v. Davies* (c), the same principle was recognized. This objection applied to all the grounds. But if any doubt existed as to the third ground, it must be perfectly clear that the arbitrator had not committed the fault suggested by that ground. The objection was, that the arbitrator had given *no* directions as to the future enjoyment of the property. It was, how-

1841.

Ross

v.
CLIFTON.(a) *Ante*, vol. 4, p. 54.(b) *Ante*, vol. 8, p. 654.

(c) 3 Ad. & Ell. 200; 4 N. & M. 788.

1841.

Ross

v.

CLIFTON.

ever, perfectly clear that he had given some directions. They might not be such directions as the defendant thought desirable, but that constituted no ground of objection. That was a matter peculiarly within the jurisdiction of the arbitrator, he being judge both of law and fact. In *Snook v. Hellyer* (a), the Court held, that an award directing money to be paid to a stranger for the use of one of the parties to the submission, was sufficient (b). For these reasons, it was submitted, that the grounds suggested for setting aside the award were insufficient, and, therefore, the rule for setting it aside must be discharged.

Shee, Serjt., in support of the rule, admitted that if the grounds of applying to set aside the award were as general as stated by the other side, they could not be supported; but they ought not, nor were they intended to be, divided in the manner suggested, into three heads. The whole objections to the award were, that it was inconsistent and not final. It certainly must be considered as inconsistent, as it in one part awarded that the defendant should pay a sum of money to the plaintiff for the injury done by the course which the former had adopted with respect to the property, and then directed that the same state of things should continue. The first part of the award found that a nuisance existed, and the latter directed its continuance. That was calculated to perpetuate, instead of ending the differences which the reference was intended to compose. This could not be considered as giving any direction as to the enjoyment of the property, and, therefore, the award was not final. Under these circumstances, the award could not be sustained,

Cur. adv. vult.

(a) 2 Chit. Rep. 43.

(b) See *In the matter of Mackay and Others*, 2 Ad. & Ell. 357; and *In the matter of Skeete*, ante, vol. 7, p. 613, where the Court refused an application for an attachment

at the instance of a stranger, to whom an award had directed that a certain sum should be paid by one of the parties to the submission.

WILLIAMS, J.—This was an application to set aside an award, on the ground that it was not final, and did not adjust the matters in difference between the parties. It appears, that the cause and all matters in difference were referred to an arbitrator, and, among other things, power was given to him to regulate the enjoyment of the property, which, it appears, constituted a matter in difference independent of the cause. But this matter in difference was made a subject of litigation before the arbitrator. One part of the claim for damages was made by the plaintiff, in respect of the obstruction of a flue; another, for having diverted a water-spout; a third, for building over a water-course. The arbitrator having disposed of the cause, awarded damages to the extent of 30*l.*, in respect of the claims last mentioned; he then proceeded to award that the parties respectively should enjoy the property as before. Now, as the arbitrator found that the property of the plaintiff had been injured, and that the then state of the property was pregnant, to a certain degree, with injury, as appeared by his awarding 30*l.* damages in respect of that injury, to direct the same state of things to continue was leaving the property in a state of dispute, instead of preventing future disputes, which was the peculiar object of the reference. It is impossible to say, that this was such a final adjustment of the property as was intended by the parties to the reference. It seems to me, therefore, that the award cannot be allowed to stand, and the present rule must, consequently, be made absolute.

Rule absolute.

REGINA *v.* The Mayor and Corporation of MALMESBURY.

PETERSDORFF shewed cause against a rule nisi, obtained by *Barstow*, calling on the relator, in certain proceedings in mandamus, to shew cause why those proceedings

being interested in the matter in question, on the ground of his poverty, or that other persons have induced him to apply for the writ.

1841.

ROSS

v.

CLIFTON.

The Court will not compel a relator in a mandamus, to give security for costs, he

1841.
 REGINA
 v.
 The Mayor and
 Corporation of
 MALMESBURY.

should not be stayed, until security for costs had been given. The rule for a mandamus had been made absolute. The ground of the application was the poverty of the relator, and that certain persons had induced him to apply for the mandamus. The former, it was submitted, was no reason for compelling the relator to give the security required. The only cases where the poverty of the plaintiff was allowed to operate so as to induce the Court to interfere in the manner required by this application, were those in which the plaintiff, being a pauper, acted vexatiously, or allowed himself to be made the instrument of others. But in those cases the poverty of itself was not allowed to be a ground for compelling a plaintiff to give security for costs. Applications of this kind had been allowed in proceeding by quo warranto, on the ground of the defendant's poverty, and his acting merely as the instrument of other parties. But even there, if no fraud was suggested, and the relator was a corporator, the Court would not compel him to find security for costs. In *Rex v. Wynne (a)*, the Court refused to stay proceedings in a quo warranto information, until the prosecutor gave security for costs, on the ground that he was in insolvent circumstances, it appearing that he was a corporator, and no fraud being suggested. Then, as to his being induced by others to apply for the writ, that was no ground for this application. He had a right to enforce his rights, and was, therefore, entitled to proceed. But no instance of proceeding by mandamus could be adduced in which the Court had interfered in the manner required. The case of mandamus was clearly distinguishable from that of quo warranto. In the former the party proceeded to enforce his own rights, but in the latter he might be proceeding for the benefit of others. Under these circumstances, it was submitted, that the present rule ought to be discharged.

Barstow, in support of the rule, contended, that an appli-

(a) 2 Mau. & S. 346.

cation in proceedings by mandamus, was clearly within the principle of proceedings by quo warranto. The Court had, on a variety of occasions, interfered, by granting such applications as the present, in proceedings by quo warranto, and, therefore, by analogy, the present application ought to succeed.

1841.

REGINA

v.
The Mayor and
Corporation of
MALMESBURY.

WILLIAMS, J.—One thing is perfectly clear, that if this individual has a right, there is no reason, on the ground of his poverty, merely for compelling him to find security for costs. Then comes the question, whether the Court has before interfered in cases of mandamus? It appears to me that it has not, and I am afraid of originating a practice in such a case. I remember, in the case of Dr. Free, an application was made by him in formâ pauperis, to sue out a writ of mandamus to St. John's College, Oxford. The application was allowed in that form. It seems to me, that whoever in this case may have induced the relator to proceed, as it is not sworn that he had no interest to try in the matter, and the granting the mandamus would seem to shew that he had such an interest, and it is further apparent, that his being poor cannot prevent his prosecuting the writ, I do not think, that in the absence of any such practice being shewn to exist, that I ought to originate such a one. The present rule must, therefore, be discharged; but without costs.

Rule discharged, without costs (a).

(a) See *Rez v. Day*, ante, vol. 1, p. 32.

SOLOMON v. LEEK.

HUGHES shewed cause against a rule obtained by **Willes**, for judgment as in case of a nonsuit. It was admitted, that, on a peremptory undertaking, the Court will not impose the term of the plaintiff's giving security for costs, on the ground of his having made an assignment of his property for the benefit of his creditors, previous to the commencement of the action.

On discharging
a rule for judgment
as in case
of a nonsuit, on

giving security

1841.

SOLOMON
v.
LEEK.

mitted, on the other side, that the excuse given by the plaintiff for not proceeding to trial, was sufficient to discharge the rule on a peremptory undertaking. It was, however, desired by the defendant to impose the term on the plaintiff on discharging the rule, that he should give security for costs, and that that term should be made part of the rule, discharging the rule for judgment as in case of a nonsuit. If the plaintiff, under any circumstances, could be required to give security for costs, that must be properly the subject of a distinct motion.

WILLIAMS, J.—That is properly the subject of a distinct motion.

Willes, in support of the rule, cited the case of *Taylor v. Montague*(a). There, a plaintiff, after issue joined, became bankrupt, and made default in going to trial, his assignees refusing to proceed with the suit. The Court refused to discharge the rule for judgment as in case of a nonsuit, on a peremptory undertaking, unless security for costs was given. Here the plaintiff had executed an assignment for the benefit of his creditors, and, therefore, the action could only be carried on for their benefit. It was, therefore, proper that the plaintiff should be called upon to give security for costs.

Hughes distinguished the present case from the one cited; as, in the latter, the bankruptcy had taken place after issue joined, and, consequently, after the commencement of the action. Here, however, the assignment suggested had been executed before the action commenced.

WILLIAMS, J.—In the case cited, the plaintiff became bankrupt after issue joined. Here, however, the plaintiff executed the assignment before the action was brought, the

(a) 2 M. & W. 315.

ordinary terms, therefore, can only be imposed. The present rule may be discharged on a peremptory undertaking.

1841.

SOLOMON
v.
LEEK.

Rule accordingly.

Doe dem. DICKINSON v. ROE.

TOPHAM moved for judgment against the casual ejector. The peculiarity of the case was, that the name of the tenant in possession, Richard Garratt, was introduced into the body of the declaration, instead of Richard Roe. The notice at the foot of the declaration was, however, signed "Richard Roe." It was submitted, that this apparent inconsistency could not mislead the tenant, and, therefore, the lessor of the plaintiff was entitled to sign judgment against the casual ejector.

If the name of a tenant in possession has been introduced into a declaration of ejectment, instead of "Richard Roe," it is sufficient service to obtain a rule nisi for judgment.

WILLIAMS. J.—I think sufficient has been done to entitle you to a rule nisi.

Rule nisi granted.

COURT OF COMMON PLEAS.

Hilary Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1841.

DOE dem. HICKMAN v. HICKMAN.

In support of an application to enter a suggestion to try a cause in Nottinghamshire instead of Lincolnshire, upon the ground that the lessor of the plaintiff could not have a fair and impartial trial in the former county, an affidavit was produced, alleging that two attorneys, whom the lessor of the plaintiff had successively employed to conduct the cause had abandoned his interest, the one on account of a bribe paid to him by the defendant, the other on account of an intimacy which

existed between him and the defendant, and also that the defendant was a person of large property, and possessing great influence in the county, and that he had said that he would "do as he liked at Lincoln," more especially as the lessor of the plaintiff was a poor man : *Held*, insufficient.

SHEE, Serjt., moved, on behalf of the lessor of the plaintiff, for a rule, calling upon the defendant to shew cause why a suggestion should not be entered on the issue to try the action in Nottinghamshire, instead of Lincolnshire, upon the ground that a fair and impartial trial could not be had in the latter county. The affidavit, on which the rule was moved, was that of the lessor of the plaintiff, and he stated that the defendant was a person possessing considerable property, and that the deponent was an individual of small means. In Easter Term, 1838, the deponent entrusted one A., an attorney, to commence actions of ejectment to recover possession of certain premises held by the defendant; that the actions were commenced, and that a few days before Trinity Term in the same year, the attorney proceeded to Gainsborough, to serve the declaration; that subsequently, the attorney took no further steps in the suit, in consequence, as he had admitted, of his having received a considerable sum of money from the defendant, in consideration of which he had abandoned the interest of the deponent in the cause. The affidavit then went on to allege, that the deponent had been at all times

ready and willing to supply the said A. with all the funds and means necessary to carry on the action. It was then stated that the lessor of the plaintiff had subsequently employed one S., an attorney, to prosecute an action of ejectment against the defendant, and that the suit had been commenced in the Court of Exchequer, and had proceeded to issue, when the said S. also abandoned the interest of his client in that cause. He had subsequently, however, commenced a new action in this Court, to which the defendant had appeared, and in which issue was joined; but the said S. refused to proceed with it. The deponent then stated, that he was at a loss to account for such conduct on the part of S., except from a circumstance, of which he had been informed, that since the commencement of the suit, an intimacy had sprung up between the said S. and the defendant, which had induced the former to abandon the interest of this deponent; that the deponent attributed all the difficulties to which he had been subjected, to the influence which the defendant possessed in the county of Lincoln; that the defendant, being in possession of property, had ample funds to enforce his influence; that the defendant possessed other property besides that which was in question in this action, the tenants of which were subject to the caprice and control of the defendant; that the deponent believed that the defendant would use his utmost influence to prevent this deponent from having a fair trial in this action, for that he had said that he would "do as he liked in Lincoln," more especially as this deponent was a poor man.

MAULE, J.—If all these allegations are true, the effect will be, that the nearer home the case is tried, the greater influence there will be against the defendant. All you have stated is, that there are two attorneys at Lincoln who have acted improperly.

ERSKINE, J.—A gentleman who is known to have acted

1841.

Doe dem.

HICKMAN

v.

HICKMAN.

1841.

Doe dem.
 HICKMAN
 v.
 HICKMAN.

as the defendant is stated to have done, will have very little influence over a jury.

TINDAL, C. J.—That these attorneys have acted dishonestly, is nothing to support this motion. It should appear clearly that there cannot be a fair and impartial trial in the county of Lincoln. That does not appear here. There are three divisions of the county, each of which is almost equal in size to many small counties, and we cannot say that among so many jurors, there cannot be a fair and impartial trial.

Rule refused.

CASSIDY v. STEUART, M. P.

In an action against a member of Parliament, it is incompetent for the plaintiff, either upon *mesne* or final process, to sue out writs for the purpose of proceeding to outlawry, although he may have no present intention, of putting them in execution.

SPANKIE, Serjt., in Michaelmas Term, moved for a rule, calling upon the defendant to shew cause why an order of *Erkine*, J., made at Chambers, should not be set aside. The action was brought against the defendant, who was a member of Parliament, and the plaintiff had obtained judgment, and proceeded to outlawry. The defendant, however, took out a summons before *Erskine*, J., at Chambers, and an order was made in the following terms—"It is ordered, that all proceedings to outlawry in this cause be set aside for irregularity, the defendant being a member of Parliament." It was now urged, that the fact of the defendant being a member of Parliament, created no ground of irregularity, upon which, the learned judge was authorized to set aside the judgment. The privilege of a member of Parliament was personal only, and there was nothing to prevent a plaintiff from suing out process of outlawry, provided he did not molest the person of the defendant. The plaintiff had issued a writ of *capias utlagatum* upon the judgment, but he had no present intention to put it into execution; and, in fact, he had issued it only in order to be prepared in any event which might arise by which he

should be able to take the body of the defendant. The privilege rested upon the provisions of the statutes 12 & 13 Wm. 3, c. 3, and 10 Geo. 3, c. 50, s. 2; but the effect of both of these acts was to shew that the privilege was personal only. The former statute provided, that "any person may prosecute any suit in any of his Majesty's Courts at Westminster, &c., against any lord of Parliament, or any of the knights, citizens, and burgesses of the House of Commons, or their servants, or any other persons entitled to privilege of Parliament, at any time immediately after the dissolution or prorogation of Parliament, until a new Parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both Houses for above fourteen days, until both Houses shall meet; and the said Court may, after such dissolution, prorogation, or adjournment, proceed to give judgment, and to make final decrees and sentences thereupon, any privilege of Parliament notwithstanding." Section 2, "Provided, that this act shall not subject the person of any of the knights, citizens, and burgesses, or any other person entitled to privilege of Parliament, to be arrested during the time of the privilege, &c." The 10 Geo. 3, c. 50, carried the principle of this statute further. The preamble states, that the acts already in being are insufficient to obviate the inconveniences arising from delay of suits, by reason of the privilege of Parliament; and then it enacts, "That any person or persons shall and may *at any time* commence and prosecute any action or suit in any Court of Record, or Court of Equity, or of Admiralty, &c., against any peer or lord of Parliament of Great Britain, or against any of the knights, citizens, or burgesses, &c., or any other person entitled to the privilege of Parliament of Great Britain, and no such action, suit, or any other process or proceedings thereupon shall, at any time, be impeached, stayed or delayed by or under colour or pretence of any privilege of Parliament." Section 2, "Provided, that nothing in this act shall extend to subject the person of any of the knights,

1841.

CASSIDY

v.

STEWART,

M. P.

1841.

CASSIDY

v.

STEWART,
M. P.

citizens, and burgesses, &c., to be arrested or imprisoned upon any such suit or proceedings." It must be admitted, that throughout these enactments, the legislature had maintained the personal privilege of members of Parliament inviolate, but there was nothing contained in them which would prevent the issuing of the process ready to be acted upon, and the distinction was, that it was not the process which was irregular, but the execution of it. He cited 1 *Hatsell's Prec.* 174, s. 4, as follows:—"On the 13th of May, 1607, the House was informed that a member of the House stood outlawed at the suit of one Palmer, and that Allen, the attorney in the suit, did threaten to proceed to trial. The plaintiff and attorney are both ordered to be brought to the bar by the sergeant," *Bac. Abr.* tit. "*Privilege*," (C), p. 562, *Holiday v. Pitt* (a).

Bompas, Serjt., now shewed cause. The distinction drawn between the existence of the writ of *capias utlagatum* and its execution would not prevail. The judgment of outlawry here was founded upon final judgment obtained in the suit. After the judgment, a writ of *ca. sa.* was issued, followed by an *exigi facias*, which was succeeded by a writ of *capias utlagatum*. All these writs commanded the sheriff to take the body of the defendant, and if the defendant omitted to answer to the last named writ by surrendering his person, he was outlawed, and his goods were forfeited. The Court would not suffer outlawry to attach in reference to an individual who was entitled to claim a personal privilege from an arrest, which was a condition precedent to the outlawry, neither would they suffer writs to be sued out and to remain in existence, which, it was admitted, could not be executed. Before the 12 & 13 Wm. 3, c. 3, the privileges claimed by peers and members of Parliament were not personal merely, but extended to prevent legal

(a) 2 *Stra.* 985; *Fortesc.* 159; 2 *Comyns.* 444. S. C.

proceedings of any sort being taken against them. The object of that act was only to enable parties to commence suits against them, provided that the persons of the individuals sued should be privileged from arrest, and a new form of proceeding was granted against them by s. 4, which shewed the view which was taken of their privileges by the legislature, and exhibited the determination which existed to maintain them inviolate. That section provided, that "no suit or proceeding in law or equity against the King's original and immediate debtor, for the recovery of any debt originally and immediately due to his Majesty, or against any person liable to render an account to his Majesty for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of Parliament; yet, so that the person of such debtor or accountant being a peer, shall not be liable to be arrested; or being a member of the House of Commons, shall not, during the continuance of the privilege, be arrested by any such proceedings." The 2 & 3 Anne, c. 18, equally exhibited the same feeling to exist, by enacting, that nothing contained therein should subject the person of a peer or member of Parliament to be arrested. The 11 Geo. 2, c. 24, still further extended the principle, and the 10 Geo. 3, c. 50, embraced all the provisions of the former statutes, and re-enacted, with the greatest caution, the same clauses which provided for the maintenance of the privilege of Parliament. Although the legislature had given creditors relief by granting them power to sue members of Parliament, there was nothing in any of the statutes which shewed that process might be sued out, which rendered the persons of such members liable to arrest, although no intention existed to put it into execution. In the case of *Holiday v. Pitt*, the application was to discharge Colonel Pitt, who had been arrested on his way home from Parliament, and the effect of that case was to shew that not only the arrest, but the order which commanded the

1841.

CASSIDY

v.

STEUART,
M. P.

1841.

CASSIDY
v.
STEWART,
M. P.

arrest, was illegal and irregular. The passage from *Hatsell's Precedents* did not warrant the conclusion which was put upon it. Section 17, p. 181, in the same volume, gave the following case: "In the *Fourth Register*, p. 810, *Prynn* reports the case of *Hodges and Moore*, in the first year of Charles the First, as follows:—'Moore having the privilege of Parliament, procures the Speaker, Sir H. Finch, to write his letter, in the name of the Parliament, to the Court of King's Bench to stay judgment. The Court was greatly offended at this, and could have returned a sharp answer to the Parliament, if it had not been dissolved; because it is against the oaths of the judges to stay judgments, nec per grand seal, nec per petit seal, per le statute; but the way in such case is to procure a supersedas, which is a special writ appointed in these cases, and this is to be allowed, being the legal course. But the letter is not to be regarded.' And in another report of this case, the effect of this letter was disallowed by the whole Court, and the Court said, 'The defendant ought to have brought a writ of privilege, and where Thorpe, who was Speaker, had a supersedeas for all actions, this was bad, for he ought to have had a particular superdeas for each action. And the Parliament hath privilege for the person, but not for the proceedings by any letter.'" It was true, that this was the opinion expressed by the judges in that case, but *Hatsell* went on to remark, that if the judges had continued of the same mind, "to have written a sharp answer to Parliament," it was probable "that that House of Commons would have compelled the High Commission Court 'to vacate, and annihilate' all their proceedings against Sir Robert Howard, who, in breach of their privilege, would not have quietly acquiesced in their disobedience of the Court of King's Bench to an order, which, from the beginning of the century, had been sent to all the Courts of Westminster Hall, and, as far as appears, had been always attended to." There were several cases in which writs of ca. sa. had been set aside as irregular,

Faulkner v. Lord Rokeby (a), *Briscoe v. The Earl of Egremont* (b).

1841.

CASSIDY

v.

STEUART,
M. P.

Spankie, Serjt., intimated that he was prepared to admit that process could not be issued against a peer.

Bompas, Serjt. Then the plaintiff was out of Court, as the cases of peers and members of Parliament stood upon the same ground. *Bac. Abr.* tit. "*Privilege*," (C), p. 541.

Spankie, Serjt., in support of the rule. The intention of the legislature was to enable persons to sue members of Parliament at their pleasure, so as they did not arrest their persons. In 2 *Hale's Pl. Cr.* (c) it was said, that a *capias* would not lie against a peer of Parliament, by reason of his title and dignity, in which particular there was a material difference from the case of a member of the House of Commons. In no statute, was there any provision contained with reference to the privilege of a peer, because, at the common law, that privilege already existed. In this particular, therefore, there was a material distinction between the cases of a peer, and a member of the House of Commons. It was admitted that the writ of *capias utlagatum* could not be executed during privilege, but it might be sued out during privilege, and executed when that privilege had ceased. The privilege was only temporary, and the plaintiff was entitled to be prepared to take advantage of the judgment which he had obtained, so soon as it had ceased. Outlawry was a mode of enforcing payment of a debt, and it was the fault of the debtor himself, that that mode of enforcement had been put into operation, because, by paying the amount due, he might rid himself of all inconvenience. But if a party might prosecute a suit against a member of Parliament, provided he did not arrest his person, why might he not also proceed to outlawry with the same saving. In the

(a) 4 Taunt. 668.

(c) P. 199.

(b) 3 Mau. & Sel. 88.

1841.

CASSIDY

v.

STEWART,
M. P.

case of *Johnson v. Drier* (a), *Littledale*, J., alluded to the decision in *Biscoe v. Kennedy and Wife* (b), cited on behalf of the defendant, with little approbation. The 2 Wm. 4, c. 39, it was to be observed, did not materially affect the case.

TINDAL, C. J.—The question, in this case, appears to me to be, whether it is an irregularity to sue out a writ of ca. sa. against a member of Parliament, during the time within which he is privileged from arrest, the object of the party suing out the writ being to proceed to outlawry. I will first consider, whether it is irregular to sue out a writ of ca. sa.? Then, if that question is determined in the affirmative, I will see whether the intention of the party in suing out the writ, can make any difference as to the irregularity of that proceeding. The first question is, on what ground does a writ of ca. sa. rest in our books of law? Undoubtedly it is a writ which was not known at common law. There was, at common law, no *capias* on mesne process, but that writ was given by the statute of Marlberge, (52 Hen. 3, c. 21.) But the moment a *capias ad respondendum* was given by that statute, it was allowed that where that writ lay, there should also be a ca. sa., for the purpose of giving the fruits of the judgment upon it to the plaintiff. As far as we can trace the ground upon which that writ rests, it can only be said to have been granted with that view; the rule, therefore, has always been considered to be laid down broadly, that a writ of *capias ad satisfaciendum* would only lie against those who were subject to a writ of *capias ad respondendum*. The first question upon this case is, therefore, whether a member of Parliament, during the time of privilege, was liable to a *capias ad respondendum*? And it seems to me, that on all the authorities in the books, he was not so liable. From the earliest time, when the arrest of a member of Parliament has taken place upon a *capias ad respondendum*, he has been discharged from the custody of

(a) *Ante*, vol. 1, p. 127.

(b) 2 Wils. 127.

the sheriff, by a writ of privilege. The books of practice, therefore, lay it down, that those parties only are liable to a writ of ca. sa., who are liable to writs of capias as mesne process, and they except in all cases peers of Parliament, and members of Parliament, during privilege; and the old books state exceptions in those cases, which shew the ground of privilege. In the case of *Harris v. Lord Mountjoy* (a), a plaint of debt was brought by the plaintiff, in the Guildhall, in London, against the Lord Mountjoy and an attachment of the goods of the defendant, in the hands of another was made. "The lord removed the matter into the Court of Common Pleas, by a writ of privilege, and the question was, whether he should find bail, he being a lord of Parliament? And the opinion of the whole Court, was, that he should find bail, for that is the course of the Court, whosoever is party. And by *Anderson*, admitting the law to be, that the body of a lord of Parliament shall not be taken in execution, yet, notwithstanding that bail shall be found in such case, for the condition of bail doth consist upon two points: first, that he render his body to prison in execution, if judgment be given against him; secondly, or to pay the condemnation; and, therefore, if the body of a baron of Parliament is not subject to execution, yet the bail shall stand for the second, *i. e.* to pay the condemnation. And all the justices were of clear opinion, that for execution upon a statute staple, merchant, upon the statute of Acton Burnel, or upon the statute of 23 Hen. 8, the body of a baron of Parliament shall be taken in execution; for by these statutes such persons were not exempted." Now, the very exceptions of allowing the imprisonment of members of Parliament, in cases on these statutes, shew that the right of privilege exists, although it cannot prevail against their provisions. The case of *The Executors of Skewys v. Chamond* (b), is to the same effect. There, after a member of the House of Commons had been taken in execution, on

1841.

CASSIDY

v.

STEUART,
M. P.

(a) 2 Leonard. 173.

(b) Dyer. 596, 60 a & b.

1841.

CASSIDY

v.

STEUART,
M. P.

a writ of exigent, issued upon a ca. sa., a writ of privilege issued to the sheriff, who discharged the burgess from custody. The question which arose, was, whether the privilege existed? And after that question was discussed, it was held, that "every privilege is by prescription, and every prescription which sounds for the common weal is good, although it be to the prejudice of any private individual." Therefore, it may well be, that although a *capias ad respondendum* was given by the early statute against the subject in general, the privilege of members of Parliament would form an exception to its provisions. So it appears that members of Parliament had this prescription to be free, both from writs of *capias ad respondendum* and also writs of *capias ad satisfaciendum*; and so it is laid down by Lord Chief Justice *Hale*, in the passage which has been cited^(a), in which he says, that in a suit between party and party, a writ of *capias* will not lie against a lord of Parliament; and the case of a member of Parliament, during privilege, is the same as that of a peer of Parliament, for the purpose of this argument. Then, if that be the case, if to issue a writ of *capias ad satisfaciendum* is irregular and unlawful in itself, can it make any difference what the object or desire of the party is, in causing it to be issued? I think it cannot, because the matter is to be taken as it stands on the issuing of the writ. That is an irregularity, and no intention or design of the party can make it more or less regular. The Court requires the sheriff to execute the writ, and how can the intention of the party alter the object of the writ? If the plaintiff says, "I issue this writ for the purpose of proceeding to outlawry," that does not diminish the difficulty, but increases it, because the exigent requires the defendant to render himself into the custody of the sheriff, or be outlawed, so that the difficulty is increased, by there being another demand made, which is irregular and unlawful. Now, this being the case, what difference is made by the

(a) 2 Hale Pl. Cr. 199.

acts of parliament referred to? It does not appear to me that they bear on this point: but if they do, they rather operate unfavourably than favourably towards this motion. The statute 12 & 13 Wm. 3, c. 3, was passed for the purpose of enabling the subjects of the King to sue members of Parliament, during the interval in which Parliament should not be sitting. That statute provides what proceedings shall be taken, and enacts that certain writs shall be used; and then there is in it an express provision that the persons of members shall not be liable to arrest. The next material act is the 10 Geo. 3, c. 50, and that enables suitors to commence and prosecute suits during the sitting of Parliament, still introducing the same express exception in favour of the privilege of the persons of members, which was contained in the previous act; and then comes the 2 Wm. 4, c. 39, which has made the mode of proceeding against members of Parliament the same as against other persons; and section 19, has an express reservation, that nothing contained in the statute shall subject any person to arrest, outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now, by law, be exempt therefrom. Therefore, it seems to me, that these statutes do not at all further the views of the plaintiff. If we were to allow these to be deemed regular proceedings, we should be issuing an order to the sheriff to take a person, whom, the moment he was taken, we should be forced to discharge, and we should therefore be doing an act which we know to be nugatory. The proceedings to outlawry, in this case, therefore, were irregular; and the order made by my brother *Erskine*, at Chambers, was a proper order, and this rule must be discharged.

BOSANQUET, J.—I am also of opinion that this rule should be discharged. There is no doubt, and it is admitted that members of Parliament, whether of the House of Lords or of the House of Commons, are exempted from the arrest of their persons; and this is a privilege which

1841.

CASSIDY

v.

STEUART,
M. P.

1841.

CASSIDY

v.

STEWART,
M. P.

they have enjoyed for a great length of time. Formerly, their privilege was even more extensive than it is now, because they were exempt from being even sued, during the time of the sitting of Parliament; but they are now liable to be sued, although their privilege to be exempted from arrest is recognized by the various statutes which have been alluded to. There is no doubt, therefore, that the arrest of a member of Parliament, during the period of privilege, is illegal. Now, the question is, whether, if the arrest is illegal, it is lawful for the plaintiff in a suit, to sue out process, directing the sheriff to take the person of a member of Parliament in execution? It will be the same, however, whether the writ is issued on mesne process or in execution. It appears to me, that the thing ordered to be done, being illegal, the order to do the act must itself be also illegal. It is said, that the object is not to arrest the person of the member of Parliament, but to take proceedings, by which outlawry may be obtained, when the period shall have arrived at which the privilege of the defendant has ceased. But the direction is to do the act immediately; and it appears to me, that the defendant is not to be put in the situation of having an order issued against him, which, if the sheriff executes it, must put him to the trouble and expense of obtaining redress against that which is an illegal act. Therefore, on these short grounds, it appears to me that the issuing of the writ is illegal, because the plaintiff, in issuing it, avails himself of an order of the Court to do that which is illegal.

MAULE, J.—I also think that this rule must be discharged, and that the learned judge was right in making an order setting these proceedings aside. The statute 12 & 13 Wm. 3, c. 3, and 10 Geo. 3, c. 50, both prove that persons having the privilege of Parliament are not liable to be arrested. If that is so, the writ ordering such an arrest is irregular, for whatever purpose it may have been sued out. It was so held in those cases which have been cited

in opposition to this motion. In the case of *Faulkner v. Lord Rokeby*, a *capias* was issued against a peer of Ireland, and there it was held, that although no attempt had been made to arrest the defendant, the writ was irregular, and must be set aside. So in the case of *Briscoe v. Earl of Egremont*, a bill of Middlesex was set aside upon the same ground. My brother *Spankie* has admitted that this is the law in the case of a peer. Then why is not that the law in the case of a member of the House of Commons? He says that the privilege of a peer of Parliament, and that of a member of the House of Commons differ; and undoubtedly they do in some respects, but the only principle necessary to be maintained here, is, that they agree in this particular, that the issue of a writ of *ca. sa.* against a person who, by reason of his privilege of exemption from arrest, cannot be seized in his person, is irregular. It is admitted that a member of Parliament is not liable to be arrested, and the consequence follows, that a writ, ordering him to be taken, is irregular. The distinction between the privilege of a peer, and that of a member of Parliament does not apply to the matter in hand; and those cases to which I have referred, are authorities to shew that a *capias* is irregular, if issued against a member of Parliament. A writ of *capias*, therefore, against a member of either House of Parliament, is irregular, as ordering that to be done which cannot, by law, be done.

1841.
 CASSIDY
 v.
 STEUART,
 M. P.

ERSKINE, J.—I still continue of the opinion which I expressed at Chambers, that these proceedings were irregular, and that the proper course to adopt was to set them aside on that ground. The principles upon which it struck me, that I should adopt that course, were those which had been already so fully discussed, and it is unnecessary for me now to go into them again, except to say, that the case of *Crew v. Bails (a)*, shews satisfactorily, that where a writ of *capias*

(a) 1 Leonard, 329.

1841.

CASSIDY

v.

STEWART,
M. P.

ad respondendum would not lie, there could be no writ of *capias ad satisfaciendum*, and no proceedings to outlawry. That was a case where an attorney had commenced an action by a bill of privilege, and having obtained judgment, sued out a *ca. sa.*, and proceeded to outlawry; and then a writ of error was brought, and on that writ of error the Court set aside all the proceedings to outlawry. So, it appears to me, that this action could not have been commenced against a member of Parliament by a writ of *capias ad respondendum*, and, therefore, that no *capias* in execution could issue to lay the foundation of process of outlawry. Before the statute 12 & 13 Wm. 3, c. 3, there could have been no process against a member of Parliament. That statute extended the law, by giving liberty to persons to issue process against members of Parliament, in the interval between the Sessions, and pointed out what process might be issued. There are not only no words in that statute which sanction the issuing of a *capias*, but there is a distinct provision, which shews that it was not the intention of the legislature that that should be done. The proceedings allowed, do not refer to any writ of *capias*, and the act impliedly declares that no such writ shall be issued. Then the 10 Geo. 3, c. 50, although it is more general in its provisions, and allows parties to proceed against a member of Parliament during the Session, yet still obviously exhibits its meaning to be merely to extend that liberty to sue, which before existed only in the intervals between the Sittings of Parliament, to all times; so that now a party may proceed up to execution with an action, although Parliament is actually sitting. There being, therefore, nothing to shew that any writ of *capias* could at any time have been issued against a member of Parliament, at the commencement of an action, so also, I think, it cannot be used as a writ of execution, although the party suing it out shall state that it is not his intention to execute it.

Rule discharged, with costs.

1841.

TREGO v. TATHAM.

ADAMS, Serjt., in Michaelmas Term, moved for a rule, calling upon the plaintiff to shew cause, why a rule absolute to compute, which had been obtained in this suit, should not be set aside. It appeared, from the affidavits, that it was an action on a bill of exchange, and the defendant, on the 19th of November, demurred to the declaration, but by mistake, entitled his demurrer "*Trego ats. Tatham.*" On the 20th, the defendant's attorney applied to the plaintiff's attorney for joinder on demurrer, when he was informed that an informal demurrer had been delivered, and that judgment for want of a plea had been signed. On the 21st, the defendant's attorney obtained a summons at Chambers, to set aside the judgment, and he served the plaintiff's attorney with that summons on the same day. On that day also, the plaintiff obtained a rule nisi to compute in this Court. The summons was returnable on the 23rd, but the plaintiff's attorney did not attend the learned judge. A fresh summons was, in consequence, issued on the same day, and on the 24th, the rule to compute was made absolute. It was urged, that the summons operated as a stay of proceedings, and that the rule to compute having been made absolute, pending that summons, it was irregular, and must be set aside.

The defendant having on 19th of November, delivered a demurrer to a declaration, wrongly entitled, the plaintiff, on the 20th, signed judgment for want of a plea. On the 21st, the defendant obtained a summons at Chambers, to set aside the judgment, and on the same day, the plaintiff obtained a rule nisi to compute. Before the summons was heard, the plaintiff made the rule to compute absolute: *Held*, that the summons operated as a stay upon the proceedings of the plaintiff, and that the rule absolute to compute must be set aside.

Channell, Serjt., now shewed cause. A summons obtained at Chambers, could not operate as a stay of proceedings upon a rule in this Court. The issuing of the summons was not so much the result of the act of the judge, as of the party at whose instance it was obtained, and the Court would not consent to its proceedings being stayed by such process. It was the duty of the defendant to come to the Court.

1841.
 TREGO
 v.
 TATHAM.

Adams, Serjt., *contra*. The application to the judge at Chambers, was for the convenience of the parties and the Court, and the effect of the summons must be considered to be the same as that of a rule obtained in Court.

TINDAL, C. J.—It appears to me, that the effect of the summons before the judge at Chambers upon the party, is to stay his proceedings in Court, at least until the summons is returnable. It is not necessary to view it as a stay of proceedings of the Court: that would be putting the power of the judge, and the the power of the Court in opposition; but the effect of it, in this case, ought to have been to keep the rule nisi, which had been obtained, in suspense, until the question upon the summons was decided.

The rest of the Court concurred.

Rule absolute.

Re DALY.

Where on an application to file the certificate of acknowledgment of a married woman under the 3 & 4 Wm. 4, c. 74, taken at St. Petersburg, the affidavit verifying the certificate, was sworn before the British consul in Russia, but it was stated that the local magistrates were not empowered to take affidavits, the Court

TALFOURD, Serjt., moved that the certificate of the acknowledgment of the deed in this case might be filed, under the provisions of the Fines and Recoveries Act, (3 & 4 Wm. 4, c. 74.) A special commission had issued to St. Petersburg, and the papers had been returned, the affidavit, verifying the certificate, being sworn before the British consul there. The 6 Geo. 4, c. 87, s. 20, empowered British consuls abroad to take affidavits, and to do such notarial acts as any notary public might do. The question was, whether the affidavit ought to have been made before the local officers of the country, or whether it was not sufficient that it had been sworn before the consul? [*Bosanquet*, J.—Do your affidavits shew that there is any difficulty in procuring the affidavit to be

allowed the certificate to pass, as being duly verified.

sworn before the local authorities?] They do not, but the Court would, in a case of this description, exercise a discretion with regard to the reception of the affidavits. In France, the officers of that country were forbidden to take affidavits, and the Court had, in cases coming from that country, received affidavits sworn before the British consul.

1841.
Re
DALY.

TINDAL, C. J.—Perhaps you can remove the difficulty by procuring an affidavit, shewing that there is an objection on the part of the magistrates of the country to swear affidavits. You had better renew your application.

Talfourd, Serjt., on a subsequent day, intimated to the Court that he had ascertained that a similar application had been made about two years ago, when it was stated that the magistrates of Russia were not empowered to take affidavits. This, it was submitted, removed the difficulty which existed.

TINDAL, C. J.—Let it pass.

Fiat (a).

(a) Vide, *Re Barber*, ante, vol. 4, p. 640; *Re Eady*, ante, vol 6, p. 615.

COATES v. SANDY.

MANNING, Serjt., moved for a rule, calling upon the plaintiff to shew cause, why the service of the writ of A writ of summons was sued out in the month of May, but was not served upon the defendant within the four months, during which it ran under the provisions of the 2 Wm. 4, c. 39. In the following month of November, the defendant called at the office of the plaintiff's attorney, and then consented to accept service of a copy of the writ, in order to avoid further expense: *Held*, a waiver of the objection, that the operation of the writ had ceased.

A notice of declaration was served on the defendant, dated 8th of January, 1840, instead of 1841, but attached to it was a bill of particulars, correctly dated; the action had been commenced in May, 1840: *Held*, that the defendant could not have been misled by the erroneous date, and the Court refused to set aside the notice.

1841.

COATES

v.

SANDY.

summons and the notice of the declaration should not be set aside, on the ground of irregularity. The writ of summons was irregular, as it bore date in May, 1840, and the copy was not served until November in that year, which was after the period had expired during which, under the terms of the Uniformity of Process Act (2 Wm. 4, c. 39, s. 10), it would run; the notice of declaration was irregular, being dated the 8th of January, 1840, the action not having been commenced until the month of May in that year.

Channell, Serjt., on a subsequent day shewed cause. He produced affidavits, the effect of which was to shew that the irregularity as to the service of the copy of the writ had been waived. From those affidavits, it appeared, that the action had been commenced by the issuing of the writ of summons in the month of May, 1840, to recover the sum of 2*l.* 8*s.* for goods sold to the defendant. Subsequently to that period, various negotiations had been going on between the defendant and the plaintiff's attorney, which extended to the month of November, up to which time, the writ had not been served. On the 9th of November, the defendant called at the office of the plaintiff's attorney, and requested to be allowed time to pay the amount due, when he was informed that the plaintiff insisted upon the action proceeding, and that a new writ of summons or an alias writ must be sued out against him, for that which had been issued in the preceding May was out of date. To this, the defendant answered, "Never mind that, give me the copy of it now, and do not go to any further expense in suing out a new writ." He was asked whether, if he was served with a copy of the existing writ, he would accept it as good service, and he answered that he would, and that the plaintiff's attorney might appear for him. He was then served with a copy of the writ, with which he expressed himself satisfied. These circumstances, it was submitted, amounted distinctly to a waiver on the part of the defendant, which

he could not get rid of. With regard to the date of the notice of declaration, the defendant could be under no misapprehension in reference to it. From the time of the service of the copy of the writ of summons, his applications for time were renewed and granted up to the 7th of January. Having, however, repeatedly omitted to pay in accordance with his promise, on the 8th of January, 1841, he was served with the notice of declaration. The affidavit in reference to this service, stated, that that notice was "wafered to and served together with particulars of demand, dated on the 8th of January instant." The date of the particulars of demand rendered it impossible that the defendant could have been misled as to the proper date of the year, and as the defendant was perfectly aware that the action had not been commenced until after January, 1840, the Court would not allow him to take advantage of this objection. He cited *Anon. (a)*

1841.

COATES

v.
SANDY.

Manning, Serjt., in support of the rule. The writ, a copy of which had been served, was a mere nullity at the time of the service, by reason of the expiration of the four months, during which only it ran, and no waiver by the defendant could render it a valid writ, so that a copy of it could be served. He cited *Taylor v. Phillips (b)*, *Garratt v. Hooper (c)*, *Roberts v. Spurr (d)*. The fact of the particulars of demand being served with the notice of declaration, was insufficient to shew that the defendant might not have been misled by the erroneous date of the latter.

TINDAL, C. J.—This is not a case of simple waiver, or I should agree that that which is a nullity, cannot be restored by a waiver. But there is here a great deal more than that. I take the effect of what passed to be an agreement, and an admission that service of the writ, when the

(a) 2 Chit. Rep. 238.

(b) 3 East, 155.

(c) *Ante*, vol. 1, p. 28.(d) *Ante*, vol. 3, p. 551.

1841.

COATES
v.
SANDY.

conversation took place, should be considered to have been effected in due time, a waiver of actual service of the writ. What is more common than a case of this description? Here, after the writ had been sued out too long to be put in operation properly, the defendant says, being informed that there must be a new writ, in order that it may be served formally upon him, "Do not put yourself to any additional expense, serve me now, and enter an appearance for me." All the cases cited are those where steps have been taken by the party in his defence, and that has been urged as a waiver. The waiver here is of a more positive character, and one which cannot be got rid of. The second objection is, I think, sufficiently answered by the affidavit.

The rest of the Court concurred.

Rule discharged.

BATCHELOR v. DUDLEY.

In an action brought to recover the sum of 2*l.* 8*s.* 9*d.*, for goods sold and delivered, which was tried before the sheriff, the plaintiff sought to prove his claim by evidence of an admission made by the defendant at the time of service of the writ of summons, that he owed "the

debt," but the witness declined to swear that the defendant had previously read the indorsement on the writ, so as to render his admission applicable to the sum claimed, and the plaintiff recovered only 1*s.* damages; the Court, under such circumstances, refused to make a rule absolute to stay proceedings, upon payment of 1*s.*, the amount of damages, or to enter final judgment for the plaintiff without costs.

IN Michaelmas Term, *The Solicitor General* moved for a rule, calling upon the plaintiff to shew cause, why proceedings in this action should not be stayed, upon payment, by the defendant of 1*s.*, the amount of damages found by the jury, or why final judgment should not be entered up for the plaintiff without costs? The declaration was for goods sold and delivered, to which the defendant pleaded never indebted and payment. The particulars of demand stated the original debt to be 5*l.* 8*s.* 9*d.*, but gave credit for 3*l.*, which had been paid. The cause was tried before the sheriff of Stafford, when a verdict for 1*s.* only was found. The sheriff had not

the power to certify, to deprive the plaintiff of costs under the statute 43 Eliz. c. 6, *Jones v. Barnes* (a), *Wardroper v. Richardson* (b), *Pritchard v. McGill* (c). The only method, therefore, of giving the defendant that to which he was entitled was the present motion.

1841.
 BATCHELOR
 v.
 DUDLEY.

Talfourd, Serjt., now shewed cause, and produced an affidavit, which stated the circumstances which occurred at the trial. The plaintiff called a witness who had delivered the goods to the defendant, but who was unable to speak to their value; and then he called another person who had served the writ of summons in the action upon the defendant: He swore that when he delivered the writ to the defendant, he read it, and admitted that he owed a debt to the plaintiff; but the witness declined to state that the defendant had read the indorsement on the writ before he made that admission, or that he stated any amount in which he was indebted. The jury, therefore, found a verdict for 1*s.* only, there being evidence to shew that a debt was due, though there was nothing to guide them to the amount. The plaintiff also made an affidavit, in which he stated that the sum sought to be recovered was really due. It was submitted, therefore, that this was a case which would not have fallen within the principle of the statute of Elizabeth, if it had been tried before a judge; and further, that as that act could not be directly applied to the case, the defendant could not succeed by such a motion as the present in depriving the plaintiff of his costs. It was not stated that the plaintiff might have recovered the amount of his verdict in any county Court; and if there were such an allegation, the proper course would have been to move to enter a suggestion.

The Solicitor General, in support of the rule. [*Maule*, J.—

(a) *Ante*, vol. 5, p. 455; 2 M. & W. 313, S. C.

(c) 2 M. & W. 380; *Ante*, vol. 5, p. 731, S. C.

(b) 1 Ad. & Ell. 75.

1841.
BATCHELOR
v.
DUDLEY.

The object of this motion is to induce the Court to extend the principles of the statute of Elizabeth to a case to which it has been held not to apply, and, in effect, to amend a supposed defect in the statute law]. The plaintiff had persisted in trying the case before the sheriff, and in proceeding for the full amount claimed, he had obtained the writ of trial from the learned judge, upon a ground which was evidently false, namely, that there was more than 2*l.* owing to him. He might have gone to the county Court and have recovered as much as 1*l.* 19*s.*, but he did not choose to take that course, but preferred incurring and causing a far heavier expense by trying the action before the sheriff. There was nothing to shew that he was ever in a position to claim so much as 2*l.* 8*s.*, or to support such a claim by evidence. He did not shew that he had lost any proofs, or that he had not given all the evidence in his power, and the Court, by making this rule absolute, would exhibit their disposition to carry out the principle of the statute of Elizabeth.

TINDAL, C. J.—I think we have no authority to grant this application. The action is brought for a sum of 2*l.* 8*s.* 9*d.*, which is the amount indorsed on the writ. It is said that when an application was made to send the case before the sheriff, the plaintiff was guilty of a breach of good faith, by making some statement, inducing the learned judge to grant a writ of inquiry. But I do not see that such a breach of good faith is made out. He may well have supposed that the admission on the part of the defendant, which he attempted to prove, would have carried him through the case. That was an admission to a person who had seen the defendant read the writ, and had heard him admit the debt. The amount of the debt was 2*l.* 8*l.* 9*s.*, but it does not appear that the witness was able to swear that the defendant had read the indorsement at the time he made the admission, and that he, therefore, admitted the amount to be due which was specified in that indorsement. It seems to

me, then, that the plaintiff was rather taken by surprise than guilty of any breach of good faith.

The rest of the Court concurred.

Rule discharged.

1841.
BACHELOR
v.
DUDLEY.

MORISON and Others v. SALMON.

THIS was an action on the case. The declaration stated, for that whereas the plaintiffs and one James Morison, during the lifetime of the said James Morison and the plaintiffs, since his decease, for divers years, before and at the time of the committing the grievances hereafter next mentioned, did prepare, vend, and sell, and continue to prepare, vend, and sell, and still do continue to prepare, vend, and sell for profit, divers large quantities of a certain medicine, called "Morison's Universal Medicine," which said medicine the plaintiffs, &c., were, and still are used and accustomed to sell in boxes respectively wrapped up in paper, having the following, amongst other words, printed thereon, that is to say, "Morison's Universal Medicines;" and whereas the plaintiffs, &c., before and at the time of the committing the grievances hereinafter next mentioned, had gained and acquired great fame and reputation with the public, on account of the excellent quality of the said medicines so by them, &c., prepared, vended, and sold, &c., whereby the plaintiffs daily acquired and obtained great gain and profit, &c., yet the defendant, well knowing the premises, but wickedly and wrongfully, subtilely and unjustly intending to injure the plaintiffs in their said sale of the said medicines, and to deprive them of the great gain and profits which they, the plaintiffs, would otherwise have acquired by preparing, &c., the said medicines as aforesaid,

In an action on the case, the declaration was by the proprietor of certain medicines, against a person for selling medicines, prepared by the defendant, as and for, and falsely representing them to be prepared by the plaintiffs: *Held*, an action in which a question of right might arise, besides the mere right to recover damages, and in which, therefore, the judge at the trial was authorized to grant a certificate under the 3 & 4 Vict. c. 24.

Per Maule, J.—If an action be really brought to try a right, whether it is fitted for that purpose or not, the case is within the act, and a

certificate may be granted by the judge.

1841.
MORISON
and Others
v.
SALMON.

to wit, &c., and on divers other days and times, between that day and the day of the commencement of this suit, did wrongfully, knowingly, injuriously, deceitfully, and fraudulently against the will, and without the license or consent of the plaintiffs, prepare and make, and cause to be prepared and made, divers, to wit, &c., boxes of certain articles, represented and termed by him to be medicines, in imitation of the said medicine so prepared, &c., by the plaintiffs, as aforesaid, and did wrap up, and caused to be wrapped up the said last mentioned boxes of medicines in paper, having the following, amongst other words, printed thereon, that is to say, "Morison's Universal Medicines," in order to denote that such medicine was the genuine medicine prepared, vended, and sold by the plaintiffs, and did knowingly, wrongfully, deceitfully, and fraudulently vend and sell, for his own lucre and gain, the said last mentioned boxes of the said articles represented and termed by him to be medicine, by the name and description of "Morison's Universal Medicines," which had been prepared, vended, and sold by the plaintiffs, &c., whereas, in truth and in fact, the plaintiffs, nor the said James Morison in his lifetime, had never been the preparer, vendor, or seller thereof, or any part thereof, by reason of which premises, the plaintiffs had been fraudulently, deceitfully, wrongfully, and injuriously hindered and prevented by the defendant from selling, vending, and disposing of divers large quantities, to wit, &c., of the said medicine which they, the plaintiffs, would otherwise have sold, vended, and disposed of, and the plaintiffs had also been deprived of divers great gains and profits which would otherwise have accrued to them, the said plaintiffs, from the sale thereof, and had been otherwise greatly injured in the selling and vending of the said medicine.

The cause was tried before *Maule*, J., and the jury found a verdict for the plaintiffs, with one farthing damages. Upon application by the plaintiffs, the learned judge certified under the statute of 3 & 4 Vict. c. 24, that the action was

really brought to try a right, besides the mere right, to recover damages.

1841.

MORISON
and Others

v.
SALMON.

Talfourd, Serjt., now moved for a rule, calling upon the plaintiffs to shew cause, why the taxation of costs, which had taken place under this certificate, should not be set aside, and why judgment should not be entered up for the plaintiffs for the amount of damages only. He contended, that there was nothing on the face of the declaration which shewed that any right was claimed, or was sought to be tried or established. There was no exclusive right to manufacture and sell the medicines claimed, but all that was alleged was, that the defendant, by a course of fraud, had subjected the plaintiffs to damage. [*Maule*, J.—The only question which the Court have to decide is, whether, upon this record, the action could have been brought to try a right? *Tindal*, C. J.—The facts do not come before the Court, but their application to the case was in the hands of the learned judge who tried the cause]. Upon the face of the record there was no right set up.

Storks and *Bompas*, Serjts., on a subsequent day shewed cause. The object of the statute was to give the learned judge at the trial a wide discretion in granting certificates, and the mode in which the power conferred should be exercised, had been already shewn by this Court in the cases of *Shuttleworth v. Cocker* (a) and *Marriott v. Stanley* (b), decided in the last Term. The judge had a discretion which the Court would not control, and if a question of right could arise on the declaration in any way, it would not interfere to review the decision which had been pronounced. That a question of right might here arise was obvious.

Talfourd, Serjt., in support of the rule, admitted, that the question was to be regarded as it was urged on the

(a) *Ante*, p. 76.

(b) *Ante*, p. 59.

1841.

MORISON
and Othersv.
SALMON.

part of the plaintiffs, and that if any question of right, besides the mere right to recover damages, could arise upon the record, the Court would not interfere. It was to be observed, that the same power which was given to a judge at *Nisi Prius*, was given to the presiding officer of every inferior Court, and it was expedient, therefore, that the discretion to be exercised, should be narrowed within reasonable limits. Upon this declaration no question of right arose, but the real point for determination was, whether the defendant had been guilty of a wrong? It was a question of personal wrong done to the plaintiffs in the way of their trade and business, and no matter of abstract right arose. The case of nuisance cited, which had been decided by this Court, had no reference to the question now before the Court, because the plaintiff might there well complain of the manner in which the defendant occupied his premises, upon which a clear question of right would arise.

TINDAL, C. J.—I am of opinion that this rule must be discharged. It has been very properly conceded that we have no need to make any inquiry as to the facts of the case as they appeared before the judge. The act of Parliament has left the certificate entirely in his discretion, and all we have to inquire into is, whether the case in question falls within the scope and object of the act, and if it does, that is sufficient for the present subject of discussion. Now let us look at the words of the act, (3 & 4 Vict. c. 24): It provides, that if the plaintiff, in any action of trespass, or of trespass on the case, shall recover by the verdict of the jury less than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, “that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the

action shall have been brought, or that the trespass, in respect of which the action was brought, was wilful and malicious." What, therefore, the judge is called upon to do is to see the object and design which the plaintiffs had in instituting the suit; and if he is satisfied by the course of the evidence, that the plaintiffs really thought that they had a right which came in issue, or which might, by possibility, come in issue, he has a discretionary power to grant his certificate. Now, how can we say, that under the circumstances of this case, the right might not, by possibility, come in question? I can see many modes in which it could come in question. The action is brought because the defendant thought proper to sell medicines, which he makes himself, under the same name as those which the plaintiffs sell, and affixes to them letters and marks, which induce the world to suppose that they are the medicines sold by the plaintiffs. How can the plaintiffs, when they bring their action, foresee that the defendant will not set up that he has a right to sell the same description of medicine; that he has a license to do so from the original inventor; that he had purchased the right from the former owner? So other modes may suggest themselves, by which the plaintiffs may have been convinced, that in bringing the action, they were preventing their own right from being injured, as well as recovering damages for the injury which they had sustained. If, therefore, there is any case in which the discretion of the judge could be exercised, under this clause of the statute, and the exercise of which we could not question, it is this, and I think that the rule which has been obtained, the object of which is to induce us to review the decision which has been arrived at, must be discharged.

BOSANQUET, J.—I am also of opinion that the certificate which has been granted is well warranted by the statute. This action may have been brought to try the plaintiff's right to vend the medicines prepared by themselves, marked

1841.

MORISON
and Others
v.
SALMON.

1841.
MORISON
and Others
v.
SALMON.

with their own name, and stamped in a peculiar manner, without the interference of the defendant with their trade, by means of a fraudulent imitation of the articles which they sold. It might be brought to try the right of the defendant to sell these medicines in boxes, marked and stamped like those of the plaintiffs, and in either of those cases the right would come in question. With respect to the case of nuisance, it appears to me to be very much of the same description as the present. Nuisance may be either brought to recover damages for an injury to an acknowledged right, or to try a question, whether the defendant has, or has not a right to do that which he has done, which is very commonly the subject of question in an action of this sort. If the defendant asserts that he has a right to do that which he has done, in his mode of carrying on his business, notwithstanding the plaintiff being possessed of a house near to the place where the nuisance exists, it is as much a right to be tried as the right of the plaintiff to make any use of his own property. It appears to me, therefore, that the right of the plaintiffs or of the defendant may have been brought in question in this case, and that the object of the action may have been to try the right of one or the other.

ERSKINE, J.—Looking at the record in this case, I think we cannot say that the plaintiffs did not bring this action to try the defendant's right to sell these medicines. Whether they did so or not formed a question for the judge who tried the cause, who was bound to exercise his discretion.

MAULE, J.—I am also of opinion that this rule must be discharged, it having appeared to me at the trial, that this action was really brought to try a right. It is a fair inference that the action could have been brought to try a right, and that being so, I was authorized in certifying that the action was brought for that purpose. It is not a general right to carry on a trade, but the particular right, which the de-

defendant has to put certain marks on a medicine, which has acquired a degree of popularity, and to the use of which the plaintiffs may have as a great a right as if they were the patentees. Supposing the plaintiffs had proceeded in the Court of Chancery for an injunction to restrain the defendant from selling the medicine, and the Court had said that there was some uncertainty as to his right, and that he must establish it in a Court of law. The plaintiffs must, in that case, bring their action, in order to substantiate their right; and if the argument, which has here been brought before the Court, were to prevail, he would be deprived of his costs. The question is not what was the question, or what might be under the declaration, but it is, whether the action was really brought to try a right? If the action is brought to try a right, whether it is fitted for that purpose or not, the party is within the letter of the act, and within the spirit of the act also.

1841.

MORISON
and Others
v.
SALMON.

Rule discharged, with costs.

BIGNOLD v. GALE.

A rule had been obtained in this case, for setting aside an award, on four different grounds: first, the improper conduct of the arbitrators, in receiving evidence in the absence of the defendant, and without notice to him; secondly, the improper conduct of the arbitrators in allowing the attendance of the plaintiff's attorney at a certain meeting, in the absence of, and without notice to the defendant's attorney; thirdly, the improper conduct of one of the arbitrators in having required payment of a sum of money from one of the parties to the award; and fourthly, the improper conduct of the arbitrators, in conferring with the plaintiff's attorney on the matter of reference, at a

The Court will not allow cause to be shewn against a rule for setting aside an award on the last day of Term.

1841.

BIGNOLD

v.
GALE.

meeting held in the absence of the defendant, and without notice to him. On the last day of Term,

Atcherley, Serjt., moved that the rule should be discharged, and was about to shew cause, when

Bompas, Serjt., objected to the discussion of a question on an award on the last day of Term.

Atcherley, Serjt., pressed, that as a matter of convenience to the parties, the rule might be discussed. The general practice extended only to prevent a motion on an award on the last day of Term.

TINDAL, C. J.—The object of the practice, by which the Court will not hear a motion for a rule to set aside an award on the last day of Term is, that such a rule shall not hang over the head of the other parties so long. We have the authority of *Hullock*, B., in *Watkins v. Philpots* (a) that a question on an award shall not be discussed on the last day of Term. The rule must be enlarged.

Rule enlarged.

(a) M'Clel. & Y. 393 ; *vide*, R. M. 36 Geo. 3, K. B,

CURLING v. FITZGERALD.

In an action against the sheriff for his neglect to execute a writ, when the cause was called on for trial, the

plaintiff withdrew the record, in consequence of the absence of a material witness. At the taxation of the costs of the day, the Master allowed the costs of two of the officers of the sheriff to whom the writ had been directed, and who were in attendance to give evidence. The Court refused to grant a rule to review the taxation, on the ground that the witnesses were incompetent.

THE SOLICITOR GENERAL moved for a rule, calling upon the defendant to shew cause why the taxation of costs should not be reviewed in this suit. It was an action brought against the sheriff for not arresting one A. B.,

and also for the escape of the same person. The cause had gone down to trial, but on the day on which it was fixed to come on, by reason of the absence of a material witness, the plaintiff was compelled to withdraw the record, and so rendered himself liable to pay the costs of the day to the defendant. At the taxation of those costs, the Master allowed two sums of 15*l.*, charged as the costs of bringing up two witnesses, who were sheriff's officers, and to whom the execution of the writ, in respect of which the action was brought, had been entrusted. It was objected before the Master, that these persons were inadmissible as witnesses, as they were interested in the event of the suit, but the Master refused to entertain the question, and allowed the costs which were claimed. [*Erskine, J.*—They might be made good witnesses by the defendant giving them releases]. They had not been made good witnesses as yet, and as they were incompetent, the costs of their attendance could not be allowed.

1841.
CURLING
v.
FITZGERALD.

MAULE, J.—If they could be made good witnesses, it was advisable that the defendant should have them ready at the trial.

TINDAL, C. J.—The witnesses might be released at the time of the trial. I think it is a case in which the Master might exercise his discretion.

Rule refused.

JOHNSTONE v. PRING.

THE SOLICITOR GENERAL and *Bompas*, Serjt., shewed cause against a rule obtained by *Manning*, Serjt., for judgment as in case of a nonsuit. The plaintiff was but elected to proceed in the Court of Chancery, default having been made, the defendant was held to be entitled to judgment as in case of a nonsuit.

Where the plaintiff proceeded against the defendant, both at law and in equity,

the defendant was

1841.
 }
 JOHNSTONE
 v.
 PRING.

proceeding against the defendant, both at law and in equity. On the 14th of November, (during Michaelmas Term last,) he was put to his election, and he determined to proceed in equity. Notice of trial had been already given, and in consequence of the default on that notice, the defendant made the present application. It was urged, that the plaintiff having been compelled to make an election, the Court would not put him in the same situation in which he would be in the ordinary case of a default.

Manning, Serjt., in support of the rule, cited *Anderson v. Tombs* (a), which was a case precisely in point.

TINDAL, C. J.—That case is strictly in point. The Court do not see how they are to decide against it.

Rule absolute.

(a) 2 Anst. 568.

WYNNE v. WYNNE and Another.

The Court will not reject affidavits merely upon the ground of their staleness.

In the month of November, 1839, one of two defendants, (husband and wife) applied to adjudge at Chambers for leave to change his attorney on the record, on the ground that

certain pleadings of the co-defendant were opposed to his interests. The application was refused, but an indemnity was ordered to be given to preserve him from any consequences of his name being used in the cause. Various proceedings were subsequently taken in the action, but in Hilary Term, 1841, an application, similar in its nature to that at Chambers, was made to the Court, but the decision of the judge at Chambers having being so long acquiesced in, was held to be conclusive.

HALCOMB, Serjt., moved for a rule, calling upon the plaintiff, and upon Sarah, the wife of the defendant, Julius Wynne, to shew cause why the attorney for the applicant, Julius Wynne, should not be changed, and why the avowry should not be withdrawn, and judgment suffered by default by the applicant. It was an action of replevin, and the following facts appeared on the affidavits. The defendant, Julius Wynne, was the son of Mr. R. W. Wynne, who died in the year 1806. By his will, the deceased left an annuity of 20*l.* to Mrs. Wynne, to be paid to her so long as her con-

duct and behaviour was discreet, and should meet the approbation of the widow of the testator or of the survivor of certain appointed trustees. That annuity was charged upon certain lands bequeathed to one James Wynne, and up to the year 1836, it had been regularly paid. The present plaintiff at that time came into possession of the lands, and refused any longer to pay the annuity to Mrs. Wynne. The present suit was the result of proceedings which were subsequently taken to recover the annuity by distress. The avowry was in the usual terms, and the plaintiff pleaded, that after the death of the said R. W. Wynne, and before the accruing due of the arrears of the annuity sought to be recovered, the conduct and behaviour of the defendant, Sarah Wynne, was not discreet, but on the contrary thereof, on the 2nd of March, 1816, and from thence continually up to the time of the accruing due of the money, she, the said Sarah Wynne, was living in open, avowed, and notorious adultery, and in a state of polygamy with one Robert Hutton, and cohabiting with him, and was knowingly and wilfully carrying on an adulterous and criminal intercourse, whereby the annuity wholly ceased and determined. The second plea was, that after the death of the said R. W. Wynne and his wife, and before the accruing due of the annuity, the conduct and behaviour of the said Sarah Wynne was not discreet, nor was the same approved of by the survivor of the trustees, by the will of the testator appointed, and that before the taking of the distress, the said surviving trustee disapproved of the conduct of the said Sarah Wynne, whereby the said annuity wholly ceased. The defendants replied, that after the marriage of the said Sarah Wynne with the said Julius Wynne, and more than seven years before the defendant committed any adultery with the said Robert Hutton, or lived in a state of polygamy or adultery with him, and more than seven years before the said Sarah Wynne was married to the said Robert Hutton, the defendant, Julius Wynne, absented himself from the defendant, Sarah Wynne, for the space of ten years and upwards, and until the time of the

1841.
 WYNNE
 v.
 WYNNE
 and Another.

1841.
 WYNNE
 vs.
 WYNNE
 and Another.

marriage of the said Sarah Wynne with the said Robert Hutton, and from thence continually until the accruing due of the said annuity, and at the time of the intermarriage of the said Sarah Wynne with the said Robert Hutton, the said Sarah Wynne had no knowledge of her said husband, Julius Wynne, being alive. Issue. In support of the present application, the affidavit of Mr. Julius Wynne, who was an officer in the army, was now produced, and he said, that from the death of his father for many years afterwards, he was abroad, and that, until recently, he had always supposed that the annuity bequeathed to his wife, Sarah Wynne, was bequeathed to her separate use, and that he had, therefore, consented that his name should be used in the present action, as he had been informed that it was a mere matter of form that it should be so employed. That he had since been informed and believed, that the annuity had not been left to his wife's separate use, and that, therefore, he was desirous of withdrawing the avowry. It was contended, that Mr. Wynne was entitled to this rule, more especially considering the replication which was put on the record, for the Court would not compel him to sanction the allegation of facts, which, upon the face of them, might produce an impression of an admission on his part, that he had been a party to the proceedings of his wife.

Manning, Serjt., and *Robinson*, on a subsequent day shewed cause. They took a preliminary objection to the affidavits which had been produced, and which having been sworn so long ago as on the 8th of November, 1839, they contended would not be received. [*Bosanquet*, J.—That is no objection. If anything has since occurred to alter the state of things, you may prove it]. *Ramsden v. Maugham* (a) and *Burt v. Owen* (b), shewed that the Court had in some instances refused to receive stale affidavits. [*Maule*, J.—

(a) *Ante*, vol. 4, p. 403; 2 C., M. & R. 634.

(b) *Ante*, vol. 1, p. 691.

Those were cases in which the particular circumstances rendered the reception of the affidavits improper. Here there are no such circumstances]. Those affidavits had been prepared with a view to an application to *Maule, J.*, at Chambers, of a similar nature to that now before the Court; and the whole matter having there been discussed, and terms imposed, by which Mr. Julius Wynne was indemnified, the Court would not now re-open it after so great a lapse of time. The present motion was evidently the result of a collusion between Mr. Charles Wynne and Mr. Julius Wynne, to deprive the wife of the latter of the annuity which she had so long enjoyed, although, in truth, there was nothing to shew that she had acted otherwise than with the greatest propriety.

1841.
 WYNNE
 v.
 WYNNE
 and Another.

Halcomb, Serjt., contra. The avowry and replication were opposed to the interests of Mr. Julius Wynne, because the effect of them might hereafter, in the event of his seeking to procure a divorce, be taken as affording proof of its being admitted that he had sanctioned his wife's proceedings. The Court would not compel him to be concluded by such a state of facts, nor would they permit his wife, in his name, to sue for an annuity as if it were granted to her separate use, when, in truth, it was not so, but belonged to him under the terms of his father's will.

BOSANQUET, J. (a)—I am of opinion that this rule should be discharged. It is an action of replevin, which is brought to resist the payment of an annuity, which has been regularly paid from the year 1806 to 1836, at which time the present plaintiff came into possession of the land upon which it is charged. It appears that Julius Wynne never claimed this annuity on his own behalf, nor did he ever set up any right of his own, or admit the right of his wife during all that time. In consequence of Charles Wynne

(a) TINDAL, C. J., was absent.

1841.
WYNNE
v.
WYNNE
and Another.

resisting the payment of the annuity, an application is made to Julius Wynne, to enable his wife to assert the right which she has so long exercised. He accordingly authorized a distress, and appointed an attorney, but now he seeks to set aside that appointment, and to change the proceedings by which Mrs. Wynne's right is sought to be maintained. An application of a similar character has already been before my brother *Maule*, at Chambers, either for the purpose of assisting Charles Wynne, or with some other object. In the year 1839, Julius Wynne, the present applicant, went before my brother *Maule*, at Chambers, and sought then to change the attorney. When the matter was discussed, circumstances and merits were stated, and the learned judge refused to direct the attorney to be changed, but made an order that an indemnity should be given to the applicant, which, in his opinion, was sufficient to be given to the husband, in order to authorize the proceedings being carried on for the benefit of the wife. The proceedings were then suffered to go on; a declaration was delivered, and a plea put in, and all this time, there was no application made for the purpose of disputing that which had taken place before my brother *Maule*, or to withdraw the plea which had been put in. But what would be the effect of acceding to this motion? It would exclude the wife from the trial of the question at issue. The object is to try whether she has a right to the annuity or not. In my opinion, therefore, this rule should be discharged, the arrangement made by my brother *Maule* having been acquiesced in so long.

ERSKINE, J.—I also think that the Court would be lending itself to an act of injustice, if it were to make this rule absolute. The object of the rule is, to prevent the wife from trying her right to this annuity. The defence set up to the suit is, that there are arrears of an annuity due, and the husband and wife have joined for the purpose of securing the annuity. The question was sought to be put an end to by the husband going before my brother *Maule*, to

change the attorney, for the avowed purpose of putting an end to the cause. That object was not acceded to by my learned Brother; and upon what ground is it now sought to make this rule absolute? The wife has put in a replication to the plea in bar, in which she states that that which is complained of as an act of adultery, was committed by her in ignorance of the fact of her husband being alive. Now, why is she not to be allowed to try that question if she pleases? How is the conduct of the husband at all implicated? She does not charge him with having deserted her; but she may have had reason to suppose that he died abroad, and she may have married perfectly innocently. But it is said that she should not be allowed to try that question, because the annuity does not, in fact, belong to her, but to her husband. The judgment, if recovered, will be the judgment of the two defendants, and it will be still open to Julius Wynne to insist on his rights, and to apply that to his own use, to which he is entitled; but if we were to accede to this motion, we should close this question against the wife for ever.

1841.
 WYNNE
 v.
 WYNNE
 and Another.

MAULE, J.—This is a case in which the wife insists on her rights, and wishes to institute proceedings to enforce them. She cannot do that in point of law, without having her husband joined with her as a formal party. He objects to it, but his objection is answered by his receiving an indemnity. That is the effect of the order of November, 1839, and nothing has happened since then, which is not in conformity with it; but if it were not so, it would have been the duty of the husband to move to set it aside. Having acquiesced in the proceedings of the party, since November, 1839, it would be most unjust that at this time the present motion should be acceded to.

Rule discharged, with costs.

1841.

SMITH *v.* KNOWELDEN.

Slander. The declaration alleged that the defendant had spoken the following words of the plaintiff, "Smith has got himself into trouble; he is out on bail, for 100*l.*, and is to be tried at the Old Bailey next Monday, for buying cocks which have been stolen from Messrs. Pontifex and Co., by one of their apprentices, &c." At the trial, the evidence was that the defendant had said, that "he had heard that Smith had got into trouble," &c. *Held*, that the record was amendable under the 3 & 4 Wm. 4, c. 42. s. 24.

THIS was an action of slander, and the declaration contained the usual averments. It then went on to allege, that before the time of committing the several grievances by the defendant hereinafter mentioned, divers goods and chattels, commonly called cocks, of and belonging to certain persons trading under the style of Pontifex and Co., had been and were feloniously stolen, taken and carried away, yet the defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his good name and credit, and to bring him into public scandal, &c., and to cause it to be suspected and believed, &c., that the plaintiff had been and was guilty of feloniously receiving the said stolen cocks, then well knowing the same to have been so stolen, taken and carried away, and to subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin him, the plaintiff, heretofore, to wit, on the 8th of August, 1839, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning the said cocks, and of and concerning the same having been so stolen, taken, and carried away then in the presence and hearing of one Emanuel Cooper, and divers other good and worthy subjects of our Lady the Queen, &c., falsely and maliciously spoke and published of and concerning the plaintiff, &c., as aforesaid, the several false, scandalous, malicious, and defamatory words following, that is to say: "Smith (thereby meaning the plaintiff) has got himself into trouble, he (thereby meaning the plaintiff) is out on bail for 100*l.*, and is to be tried at the Old Bailey next Monday, for buying cocks, which have been stolen from Pontifex and Co. by one of their apprentices, who sold them to a person named Westbrook, and who again sold

them to Smith" (thereby meaning the plaintiff) and the said plaintiff avers that the said defendant, by the speaking of the said false, scandalous, malicious, and defamatory words at the time and in the manner aforesaid, then meant to impute and charge, and did thereby then impute and charge the said plaintiff with having received the cocks so feloniously stolen, &c., and that the said plaintiff at the time of his receiving the same, well knew that the said cocks had been and were feloniously stolen, &c., as aforesaid. By means of the speaking and publishing of which said several false, scandalous, malicious, and defamatory words by the defendant as aforesaid, the plaintiff hath been and is greatly injured in his good name, &c.

1841.
SMITH
v.
KNOWELDEN.

The defendant pleaded not guilty.

The cause was tried before Mr. Justice *Coltman*, at the second sittings in Hilary Term, 1840. Emanuel Cooper was there called to sustain the declaration, but upon cross-examination by the defendant's counsel, as to the precise words used by the defendant, he admitted that the defendant said, that "he had heard" that the plaintiff was going to be tried, &c., in the terms of the declaration. It was thereupon submitted, that there was a variance between the words proved and those set out, and that the plaintiff must be nonsuited, but the learned judge refused to grant a nonsuit, and directed the jury to find the variance, under the provisions of the 3 & 4 Wm. 4, c. 42, s. 24, and indorsed the same on the record. The case then proceeded, and the jury found a verdict for the plaintiff with 40s. damages.

In Easter Term, *Channell*, Serjt., moved for a rule, calling upon the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for the defendant, or why there should not be a nonsuit.

Bompas, Serjt., now shewed cause. The 3 & 4 Wm. 4, c. 42, s. 24, provided, "that the Court or judge shall and

1841.
SMITH
v.
KNOWELDEN.

may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and, thereupon, such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said Court, or the Court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case." The words which were proved in evidence, bore out the allegation in the declaration in all that was material. The gravamen of the statement was the offence which was imputed, and the defendant could not be prejudiced by the amendment of the allegation from a direct statement, that he had spoken the words himself, to the declaration, that he had said that he had heard something to the same effect.

Channell, Serjt., and *Wordsworth*, contra. There was a variance between the declaration and the evidence of an important and material description, because the statement that the words were repeated merely on hearsay by the defendant, referred not only to the allegation that the plaintiff was going to be tried at the Old Bailey, but to the whole sentence. The case alleged in the declaration was far more aggravated than that proved in evidence, and the difference directly affected the merits of the case, and prejudiced the defendant in his defence. The difference was between a qualified and an unqualified allegation, and it might be doubtful whether, if the former had been stated in the declaration, the defendant might not have justified it. At all events, there was nothing to shew that he might not have suffered judgment by default, if the words had been pleaded in the terms in which they had been proved. The real merits of the case were the extent of injury which the plaintiff had sustained, and for which the defendant was answerable, but

the measure of damages which the former was entitled to recover, would be materially affected by the difference between the allegation and the proof in this case. The meaning of the statute had already received a construction in the case of *Duckworth v. Harrison* (a), which was in favour of the defendant. *Bell v. Byrne* (b) and *Brooks v. Blanshard* (c) were also in point.

1841.
SMITH
v.
KNOWELDEN.

TINDAL, C. J.—I do not agree that this act of Parliament is to be strictly construed, but I should rather say, looking at the interest of the parties, that such a construction would be injurious, and that the statute, therefore, should be liberally construed. The object of the act was to prevent the necessity of multiplying counts, a system which formerly was carried to a great extent, and it would be very unjust towards plaintiffs to tie them down within very small limits in that respect, if we did not give them that benefit at nisi prius which is countenanced by this act. The words of the statute, (3 & 4 Wm. 4, c. 42, s. 24,) are these: “That it shall be lawful for any Court of Record, holding plea in civil actions, and any judge sitting at nisi prius, (if such Court or judge shall see fit do so,) to cause the record, writ, or document on which any trial may be pending before any such Court or judge, in any civil action, or in any information, &c., where any variance shall appear between the proof and the recital or setting forth on the record, &c., of any custom, contract, prescription, name, or other matter, in any particular or particulars in the judgment of such Court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in that part of the pleading where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms

(a) *Ante*, vol. 7, p. 463.

(b) 13 East, 554.

(c) 1 C. & M. 779.

1841.
SMITH
v.
KNOWELDEN.

as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement as such Court or judge shall think reasonable." It may be difficult to give any very exact meaning to the words "merits of the case," in an action of this sort, but it may be taken to mean the substantive matter which the parties came to try, without reference to the precise terms of the defence, and, therefore, the act will clearly apply to this amendment, so as to supply the place of those various allegations which would formerly have been introduced in the declaration, in order to meet every contingency which might arise. With regard to the other words "by which the opposite party cannot have been prejudiced," I cannot see how any such prejudice can have arisen to the defendant in this instance, by amending the declaration, and altering the terms of the allegation from one of a direct statement, that the words had been uttered by the defendant, to another, that they had been uttered by him on hearsay. The witnesses who would be called either to prove or disprove the fact of the words being spoken, would be just the same whether one set of words was used or the other. If the defendant had wished to amend his plea by adding a justification, I think that the statute has made a provision, which prevents his interests being injured in this respect; for it enacts, that the judge may allow him to amend, by pleading a justification, by putting off the trial to a subsequent assizes. It is clear that he cannot say that he has been injured by the amount of damages recovered, because these are the words which went to the jury, and 40*s.* damages only are found on them. This is a case, therefore, within the enacting part of the clause of the statute, and the rule must be discharged.

BOSANQUET, J.—I think also that there was a variance here between the allegation in the declaration and the words proved, which might be amended under the terms of this statute. I can by no means agree with what has been

argued, that the power which is given under the statute should be sparingly exercised, and there are many cases in which the learned judges have expressed an opinion opposed to the view which is contended for. The expression of my Lord *Abinger*, in the case of *Stansbury v. Mathews* (a) is this: "The power of amendment given by the statute, vests a wide discretion in the judge, if he exercise it to the best of his information at the time, and does not plainly appear to have been wrong, the Court will not interfere." And *Parke*, B., "unless the judges are very liberal in the allowance of amendments, the rule which binds a plaintiff to one Court will operate very harshly." And there is no question it would do so, and that point was very much considered at the time the rule was made. But the amendment should not be made where it is at all material to the merits of the case, or where it would prejudice the defendant in the conduct of his defence. Now, whether the words proved here, or those stated in the declaration, are the words on which the action is to rest, they are both of them actionable, and the circumstance of the word "heard" being inserted, makes no difference in that respect. It is true the damage may be less, and probably would be in the case of the introduction of that word, but the case is within the meaning of the legislature. The word "hear" is not material to the issue in the cause, and the learned judge was at liberty to direct the amendment to be made. With regard then to its being material to the conduct of the defence, I think the case is satisfied. It is to be observed with respect to the damages, that they have reference to the record, in its altered state, and not to the words alleged in it, as it originally stood. Therefore, as the defendant did not apply to put in any new plea, or to have the cause put off, it must be taken that he was not prejudiced in his defence, and the amendment has been properly made.

1841.
 SMITH
 v.
 KNOWELDEN.

(a) 4 M. & W. 343; *Ante*, vol. 7, p. 23, S. C.

1841.
 SMITH
 v.
 KNOWELDEN.

MAULE, J.—I also think that this is a case, in which the amendment has been properly made. The power of amendment is given in substance for the power which formerly existed, of putting a great number of counts on the record, and in order to effect the intention with which it was given the judges should be as liberal in allowing amendments, as the pleaders used to be in the number of counts which they put into declarations. The merits of the case are important of consideration, and in this instance the merits were, whether the defendant had done an injury to the plaintiff, by using some words imputing to him a felony. If we were to say that everything is material to the merits which may vary the amount of damages, and may so prejudice the opposite party, we should exclude the power of amendment in almost every supposable case; but the judge should take into consideration, not merely what appears on the record, but the facts and circumstances, and the conduct of the parties as they appear at the trial. In doing so in this case, one cannot doubt at all that the defendant meant to say that he had not used any words imputing these things that the plaintiff complains of.

Rule discharged.

AUSTEN v. EVANS.

On the trial of a cause, the plaintiff, an attorney, to support a claim for work done by him in preparing accounts to be laid before the Legacy Duty

Office, by the defendant, as executor, subpoenaed a clerk in the Legacy Duty Office to produce the accounts, bearing the defendant's signature. The clerk did not produce them, as no application with that view had been made to the comptroller: *Held*, that there was no surprise, and the Court refused to set aside a nonsuit which had been entered.

THE SOLICITOR GENERAL shewed cause against a rule which had been obtained by *Bompas*, Serjt., for setting aside the nonsuit, which had been entered upon the trial of the action, on the grounds of there being evidence for the consideration of the jury, and also of surprise. It was an action brought by an attorney to recover a sum of money

for preparing accounts to be filed at the Legacy Duty Office by the defendant as executor. The cause was tried before the sheriff, and a clerk of the Legacy Duty Office was called to produce accounts bearing the signature of the defendant. On his being placed in the box, however, he stated that he had not been permitted to bring the necessary documents, no application for that purpose having been made to the Comptroller of the Office, as was necessary. The Court, it was submitted, would not look upon this as a ground of surprise. Upon the other point, a sufficient answer was afforded by the fact that the plaintiff had submitted to be nonsuited, rather than there should be a verdict for the defendant, *Simpson v. Clayton* (a).

1841.

AUSTEN
v.
EVANS.

Bompas, Serjt., in support of the rule.

TINDAL, C. J.—This case comes within the general rule that there can be no surprise, unless every proper care has been taken. The motion is sufficiently answered on the second point.

Rule discharged.

(a) 2 Bing. N. C. 467.

HARRIS v. GOODWYN, Administratrix.

COVENANT. The declaration stated, that heretofore, before the making of the indenture between the plaintiff and Charles Samuel Goodwyn, as hereinafter mentioned, to wit, on the 8th day of April, 1826, by a certain in-

The plaintiff declared against the defendant as administratrix, upon a covenant under seal, entered into by the testator; the defendant pleaded that the testator had died insolvent, and then alleged a parol agreement with the plaintiff, upon the faith of which, she was induced to take out letters of administration to assign the deed to the plaintiff, the promise being that the plaintiff would not seek to charge her in that capacity; the plaintiff replied, taking issue upon the promise alleged in the plea: *Held*, that the plea was bad, as seeking to answer an agreement under seal, by a parol promise, and that at the trial of the cause, it was not to be taken as alleging a deed under seal, but was proved by evidence of a parol agreement, and that proof being given, therefore, a verdict for the defendant was rightly entered: *Held*, also, however, that the plaintiff was entitled to judgment, non obstante veredicto.

1841.
HARRIS
v.
GOODWYN
Administra-
trix.

indenture then made between Wm. Newton of the one part, and the plaintiff of the other part, (which said indenture, sealed with the seal of the said Wm. Newton, being in the defendant's possession, the plaintiff cannot now bring here into Court, the date whereof is the day and year aforesaid,) the said Wm. Newton did grant, demise, and lease unto the plaintiff, his executors, administrators, and assigns, a certain piece or parcel of garden, together with a certain messuage or tenement, and buildings upon the same, with the appurtenances in the said indenture more particularly described, to have and to hold the said messuage or tenement, &c., thereby demised, with the appurtenances, unto the plaintiff, his executors, &c., from the 25th day of March, then last past, for and during, and unto the full end and term of twenty-one years, from thence next following, and fully to be complete, yielding and paying therefore yearly, and every year, during the said term, unto the said Wm. Newton, his executors, &c., the yearly rent or sum of 50*l.*, of lawful money, &c., at or upon the four most usual feasts or days of payment of rent in the year, that is to say, &c., by even and equal quarterly payments, without any deduction or abatement whatsoever: the first quarterly payment thereof to begin and be made on the 24th day of June then next ensuing; and the plaintiff did thereby for himself, his executors, &c., covenant, provide, and agree to, and with the said Wm. Newton, his executors, &c., in manner following, that is to say, that he, the plaintiff, his executors, &c., should and would, from time to time, and at all times during the term thereby granted, well and truly pay, or cause to be paid unto the said Wm. Newton, his executors, &c., the said yearly rent or sum of 50*l.*, &c., and, also, that he, the plaintiff, his executors, &c., should and would, at his or their own proper cost and charges, from time to time, and at all times during the term thereby granted, well and sufficiently repair, &c., the said messuage, &c., thereby demised, with every of their appurtenances, &c.; and further that the plaintiff, his exe-

cutors, &c., should not, nor would, at any time, during the continuance of the said demise, do, or cause to be done, any manner of waste or destruction in or upon any part of the said demised premises, &c.; by virtue of which said demise, the plaintiff afterwards, to wit, on the day and year first aforesaid, entered into, and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term, so to him thereof granted as aforesaid, and being so possessed thereof, afterwards, to wit, on the 10th of August, 1826, by a certain indenture, then made between the plaintiff of the one part, and the said C. S. Goodwyn, of the other part, and which said last mentioned indenture, sealed with the seal of the said C. S. Goodwyn, being in the possession of the defendant, plaintiff cannot now bring here into Court, the date whereof is the day and year last aforesaid. After reciting as therein is recited, the plaintiff did fully and absolutely bargain, sell, assign, transfer, and set over unto the said C. S. Goodwyn, his executors, &c., the said piece and parcel of garden ground, &c., together with the said indenture of lease itself, and all benefit thereof; and also all the estate, right, title, interest, and term of years then yet to come and unexpired, property, possession, claim, and demand whatsoever, both at law and equity, &c.; to have and to hold, &c., unto the said C. S. Goodwyn, his executors, &c., from thenceforth for ordering all the residue and remainder then to come and unexpired of the said term of twenty-one years, by the said indenture granted, &c., subject nevertheless to the payment of the rent, and to the observance and performance of the several covenants and agreements in and by the said indenture of lease reserved and contained, which thenceforth on the part of the tenant or lessee were and ought to be paid, observed, and performed; and the said C. S. Goodwyn did thereby, for himself, his heirs, executors, &c., covenant, &c., to and with the plaintiff, &c., that the said C. S. Goodwyn, &c., should and would, from time to time, and at all times thereafter from the day of the

1841.

HARRIS

v.

GOODWYN
Administra-
trix.

1841.

HARRIS

v.

GOODWYN
Administra-
trix.

date of those presents, during all the rest, residue, and remainder of the said term of twenty-one years, pay the said yearly rent of 50*l.*, and well and truly abide by, and perform, &c., all, and singular the covenants, &c., in the said indenture contained, on the part of the tenant or lessee thenceforth to be observed and performed, and of and from the said rent and covenants, and agreements, and all loss, damages, costs, and expenses to be incurred or sustained by, or by reason of, or on account of the non-payment or non-observance, or non-performance of the same respectively, should and would save harmless, and keep indemnified the plaintiff, his heirs, executors, &c. ; and although the plaintiff hath always from the time of making the said last mentioned indenture of the 10th of August, 1826, hitherto well and truly performed, &c., all things therein contained on his part to be performed, &c., according to the tenor and effect, and true intent and meaning thereof, the plaintiff says, that after the making of that indenture, and during the said term, by the said first mentioned indenture granted, and in the lifetime of the said C. S. Goodwyn, to wit, on each of the following days, to wit, on the 25th of March, &c., the sum of 12*l.* 10*s.*, of the said yearly rent or sum of 50*l.* for one quarter of a year, of the said term of twenty-one years, on each of those days last elapsed, became and was due and payable, under and by virtue of, and according to the said reservation and covenant for the payment of the same in the said indenture of lease mentioned, yet the said C. S. Goodwyn did not, nor would pay the same, or any or either of them, or any part thereof, nor hath the defendant, as administratrix as aforesaid, paid the same or any part thereof; that the said C. S. Goodwyn died, to wit, on the 23rd of June, 1834, and that, afterwards, and during the said term, by the said first mentioned indenture granted, and after the death of the said C. S. Goodwyn, to wit, on each of the following days, to wit, on the 24th of June, &c., the sum of 12*l.* 10*s.* of the said yearly rent, or sum of 50*l.* for one quarter of a year, of the said term of twenty-one years,

1841.

HARRIS

v.

GOODWYN
Administra-
trix.

on each of those days last elapsed, became, and was due and payable under, and by virtue, &c.; yet the defendant did not, nor would, as administratrix as aforesaid, or otherwise, pay the same or any part thereof, and by means of which premises, and of the said defaults and omissions of payment of the said rent, when the same so became, and was due and payable as aforesaid, the plaintiff was afterwards, and after the same respectively so became due and payable as aforesaid, to wit, on the 24th of June, in the year 1832, and on divers other days and times after, and before the commencement of this suit, called upon, and forced and obliged to pay to the said W. Newton, in pursuance and according to the plaintiff's said covenant in that behalf, the said several quarters of a year of the said rent, which so became due and payable, and so remained due and payable as aforesaid, amounting together to a large sum, to wit, 287*l.* 10*s.*, and neither the said C. S. Goodwyn, in his lifetime, nor the defendant as administratrix, &c., after his death, did or would save harmless, or keep indemnified the plaintiff from the payment of the same, contrary to the said indenture of assignment, and the covenant of the said C. S. Goodwyn, so made as aforesaid. The declaration then went on to allege breaches of the covenants to repair, and to prevent waste. By means of which said breaches of covenant, secondly, and subsequently above assigned, the plaintiff hath been called upon by the said W. Newton, and forced and obliged to incur and become liable to pay, and hath incurred and become liable to pay and paid divers sums, amounting, to wit, to 250*l.* in and about the repairing, restoring, upholding, sustaining, supporting, and amending the said premises, and putting the same, with the appurtenances, in good order, repair, and condition, and the plaintiff hath been, and is damnified by reason of the said premises; and so the plaintiff, in fact, says, that the said C. S. Goodwyn in his lifetime, and the defendant as administratrix, as aforesaid, since his decease, (although often requested, &c.,) have not kept the said covenants, by

1841.

HARRIS

v.

GOODWYN
Administratrix

the said C. S. Goodwyn, for himself, his executors, made as aforesaid, but the said C. S. Goodwyn, &c., and the defendant, &c., have broken the same, and to keep the same with the plaintiff, have, and each of them hath hitherto wholly neglected and refused, and the defendant, as administratrix, as aforesaid, still does neglect and refuse; to the plaintiff's damages of 500*l*. The defendant pleaded, first, plene administravit; secondly, that the said C. S. Goodwyn died in a state of absolute insolvency, but left a will, to wit, the will in the declaration mentioned, but did not nominate or appoint any executor or executors of his will, and that she, the defendant, being the widow of the said C. S. Goodwyn did, by reason and in consequence of such insolvency of the said C. S. Goodwyn, decline and refuse until the time hereinafter mentioned, to apply for, or take out administration of the goods, chattels, and credits which were of the said C. S. Goodwyn, at the time of his death, with the last will and testament of the said C. S. Goodwyn, annexed or otherwise, of all which premises the plaintiff had notice; and she further says, that after such refusal of her, the defendant, and after the plaintiff had notice thereof, and that the said C. S. Goodwyn had so died in insolvent circumstances, and that the defendant by reason and in consequence thereof, had declined and refused to take out such administration as aforesaid; and before the commencement of this suit, to wit, on the 11th of June, 1838, the plaintiff applied to the defendant and requested her to apply for, and take out administration of the goods, chattels, and credits, which were of the said C. S. Goodwyn, the deceased, at the time of his death, with the will of the said C. S. Goodwyn annexed, for the purpose of enabling and to enable her to make a formal and legal re-assignment of the said premises in the declaration mentioned, with the appurtenances, and of the said indenture of the 8th of April, 1826, to him the plaintiff, but not for the purpose of charging her as administratrix of the goods, chattels, and credits which were of the said C. S. Goodwyn, &c., and

the defendant, at such request of the plaintiff, and on the express understanding between the plaintiff and her, and on the express promise and undertaking of the plaintiff, that if she applied for and took out administration of the goods, &c., the plaintiff would not charge or seek to charge her as such administratrix or otherwise, with any of the breaches of the covenants contained in the said indenture of the 8th of April, 1826, or the said indenture of the 10th of August, 1826; and she, the defendant, on the faith of such understanding, undertaking, and promise, and for such purpose as aforesaid, and no other purpose whatsoever, and not having nor having had in her hands, power, custody, or possession, any goods or chattels, which were of the said C. S. Goodwyn, &c., then consented to apply for and take out, and afterwards, to wit, on the 18th of July, 1838, did apply for and take out administration of, and to all and singular the goods, chattels, and credits, which were of the said C. S. Goodwyn, &c., and being the administration in the declaration mentioned; and the said defendant further says, that she has always, since she so became administratrix as aforesaid, at the request of the plaintiff as aforesaid, and for the purposes aforesaid, been, and still is ready and willing to execute a formal and legal, and proper re-assignment of the said premises in the declaration mentioned, with the appurtenances, and of the said indenture of the 8th of April, 1826, to the plaintiff, whereof the plaintiff, before the commencement of this suit, had notice, and she further says, that no goods or chattels which were of the said C. S. Goodwyn, &c., have come to or been in her hands to be administered since she so became administratrix as aforesaid, whereof the plaintiff has had notice, and that he, in breach of the said understanding, and of his said understanding and promises, has sought, and seeks by this action, to charge the defendant as administratrix as aforesaid, with the said breaches of covenant in the declaration mentioned; and this, &c. The plaintiff as to the second plea, replied, tra-

1841.

HARRIS
v.
GOODWYN
Administra-
trix.

1841.

HARRIS
v.
GOODWYN
Administra-
trix.

versing the allegations made therein, as to the undertaking or promise alleged, and to the first plea prayed judgment of assets quando acciderint. The cause was tried before *Coltman*, J., at the Sittings after Trinity Term, on the 17th of June, 1839, when a verdict was given for the defendant, upon the issue joined; the damages upon the replication to the first plea being taken at 28l. 14s. 6d. In the following Michaelmas Term

Bompas, Serjt., moved for a rule, calling upon the defendant to shew cause why that verdict should not be set aside, and why a verdict should not be entered for the plaintiff, or why judgment should not be entered for the plaintiff non obstante veredicto, or why there should not be a new trial. He contended that the effect of the second plea was to set up a parol agreement between the plaintiff and defendant, with a view to vary the liabilities of the latter under a deed under seal; an obligation incurred under a deed, however, could be varied only by deed, *Thompson v. Brown* (a), *Sellers v. Bickford* (b). It had been agreed at the trial, that the present motion should be made upon this ground, and the opinion of the jury had only been taken as to the existence of the parol agreement.

Talfourd, Serjt., and *Peacock* now shewed cause. It was unnecessary for the purposes of the defendant to dispute the principles laid down in *Thompson v. Brown*, because this case was clearly distinguishable from that, and there was no attempt here to vary any liabilities depending on deed by a parol agreement. This case rather ranged itself among that class, in which the defendant might have been induced by misrepresentations, to enter into a certain agreement, or to take upon himself a certain character or responsibility, with which he ought not to be clothed.

(a) 7 Taunt. 656.

(b) 1 Moore, 460.

The liability sought to be cast upon the defendant here was not imposed upon her by deed. At the time of the execution of the deed, which was the subject matter of the declaration, her character and position were different from those which she had since taken upon herself. Her husband had since died insolvent, and by the course of proceeding of the Ecclesiastical Court, she had assumed a new responsibility. That responsibility was imposed by no instrument equivalent to a deed, and the liabilities which accrued might be got rid of, or varied by a parol agreement or promise. The defendant had done nothing to render her liable as administratrix de son tort, and there was no principle of law which would prevent her saying, that she was not compelled to obey those obligations supposed to be cast upon her; and the effect of the present plea was not to aver against the deed, but against the character of administratrix, which she had assumed. [*Tindal*, C. J.—The ground of action is a breach of the covenants of a deed; can the defendant set up such a parol promise in answer to it? Would it not rather be a case for a cross action?] The law would not put the party to a circuitry of action, but would favour the determination of the cause by the shortest process. But the plaintiff, at all events, was entitled only to judgment non obstante veredicto. The issue raised was immaterial. It was the duty of the plaintiff to demur to the plea, if it was insufficient; and not having done so, he could not be considered as placed in the position in which otherwise he would stand, *Stennell v. Hogg* (a) and *Noell v. Nelson* (b) were cited.

1841.
 HARRIS
 v.
 GOODWYN
 Administratrix.

Bompas, Serjt., in support of the rule. The object of this motion was not to charge the administratrix personally, but only as the representative of the testator, who was the covenantor. The defendant had incurred no personal responsibility, except by pleading falsely. The Court

(a) 1 Wms. Saund. 228, b. n.

(b) 2 Wms. Saund. 216, a. n.

1841.
 {
 HARRIS
 v.
 GOODWYN
 Administra-
 trix.

would assume that a deed was alleged by the plea, but no deed was proved at the trial, and the jury should have been directed to find for the plaintiff. The promise, unless by deed, was no answer to the action; and in order to render the plea a good defence, it would be assumed that a covenant under seal was intended to be alleged. No such covenant was, however, proved, and on that ground the plaintiff was entitled to a verdict. [*Coltman, J.*, referred to *Spieres v. Parker (a)*, and *Bosanquet, J.*, to *Hudson v. Jones (b)*].

TINDAL, C. J.—In this action a rule has been obtained by my brother *Bompas*, which calls upon the defendant to shew cause why, on the second plea pleaded by him, there should not be judgment for the plaintiff non obstante verdicto, or why a verdict should not be entered for the plaintiff. It is an action on a lease under seal, entered into by the testator, to whom the defendant is administratrix, and the breach assigned is non-repair, upon which certain damages were given at the trial. The plea first on the record, is a plea of plene administravit, on which the plaintiff prays judgment of assets, quando acciderint, so that the only question for consideration arises upon the second plea. That is, that the original lessee died, having left a will, and that the defendant, who is his widow, refused to take out administration, but that upon application by the plaintiff to her, that she would take out administration, she agreed to do so, for the express purpose of enabling her to make a formal re-assignment of the lease and the premises to the plaintiff, and on the promise of the plaintiff that he would not sue her for the non-performance of the covenants of the lease; on that plea issue is joined, the plaintiff alleging that he did not undertake and promise not to charge, or seek to charge, the defendant, as administratrix, with the breaches of the covenant. Virtually, therefore, the form of the issue is upon a parol agreement or promise, that there was no such parol

(a) 1 T. R. 141.

(b) 1 Salk. 90.

promise as that stated in the plea. First, is that plea good? It appears to me that it is bad, notwithstanding the verdict; because this is an action under a contract under seal, and there is nothing which imports a release of the defendant, of the same nature as the writing by which her liability is created, and that in order to get rid of such a liability, there should be an agreement under seal, which the defendant could bring into Court to relieve her, or accord and satisfaction for the breach, which, however, the present plea does not attempt to set up. It seems to me, that as the original lessee would be bound by the obligation of the agreement under seal, which also binds his personal representative, so the personal representative is bound by the obligation under seal; and it is no answer that the personal representative was induced, by particular statements, to clothe himself with that character, but from the moment that character is assumed by her, all the consequences which follow the covenant under seal fall upon her. In the present case, therefore, there being a parol agreement between the plaintiff and defendant, of a collateral nature set up, it can have no effect in getting rid of the contract under seal. If the adoption by the defendant of the character of administratrix had been induced by any improper representations on the part of the plaintiff, it might have been good ground of application to the Court, to restrain the plaintiff from bringing the action, and then, upon affidavits, the question might have been decided; or it might have been good ground of application to the Court, out of which administration issued, to recal the letters which had been granted on the ground of improper fraudulent representations having been made. This plea, however, seems to me, to be neither more nor less than setting up a parol agreement, not going to the breach in the action, nor to the satisfaction of the damages, in answer to a contract, by which the defendant is bound under the seal of the testator. Next, is the plaintiff entitled to the verdict? The ground on which he says he is

1841.

HARRIS

v.

GOODWYN,
Administra-
trix.

1841.

HARRIS

v.

GOODWYN
Administra-
trix.

so, is this, that as the defendant has set up as an answer to the action, a promise made on a good consideration, and as no promise would be a legal answer to the action, unless under the seal of the plaintiff, it must be assumed after verdict, that the judge saw before him a contract under seal to satisfy this allegation. It seems to me, that the principle laid down by my brother *Bompas*, is extended beyond the limits to which it had been before applied. I have always understood the rule to be, that after verdicts, all shall be assumed to have been proved at the trial, which is necessary to make out the whole charge or defence, as it appears on the declaration, or on the pleadings of the cause. But in this case, the plaintiff desires the Court to go further, and not only to assume that all was proved which was necessary to be proved to make out the issue, but, in effect, to supply a different issue from that which was brought before the jury. The defendant says, that she had a parol promise from the plaintiff on a good consideration. I agree that we must assume, after verdict, that all that was necessary to make out that statement was proved at the trial. Thus, in a case under the Statute of Frauds, where a written memorandum is necessary to make out the promise alleged, that memorandum must be assumed to have been proved. But I see no reason why you are to go further, and if the party has alleged a parol promise, and issue is joined on that question you are to assume that a deed under seal, which never entered into the contemplation of the parties, was proved. Upon the whole, therefore, I think that the first part of the rule, to enter judgment for the plaintiff non obstante veredicto should be absolute. The other part must be discharged.

BOSANQUET, J.—Two questions arise under this rule, The first is, whether the issue taken has been proved; if it has not, then, as the objection of the want of proof was made at the trial, whether the plaintiff is entitled to a verdict;

on the other hand, if the issue was proved, then the question is, whether the defence set up in the plea is, or is not a good defence to the action? First, the real matter to consider, is what is the true meaning of the words on which the issue is taken? The defendant says, that on the express understanding between her and the plaintiff, and the express promise of the plaintiff, that if she applied for administration the plaintiff would not sue her, she took out administration on that faith and understanding, and the issue is, that the plaintiff did not undertake or promise as the defendant has alleged. It is contended, that the true intendment of these words is, that this was a covenant by deed. We must look at the words as they stand, and as they are associated with other words, and I think this cannot be said to be a formal obligation of a covenant under seal. It may be said, that after verdict, it might be presumed, that supposing the objection was not taken at the trial, this undertaking and promise, and undertaking were expressed by deed, and, consequently, that the defective evidence is supplied; because, unless it was a promise and undertaking by deed, it would be no defence in this case. I am not aware of any case which goes to the extent of that proposition. Whatever was necessary to make out that it was an undertaking and promise as is here alleged, may be assumed to have been proved at the trial, and taking it to be a parol promise, the question is, whether it is a defence to the action. It is pleaded to obviate the necessity of circuitry of action, and, therefore, the party would have a right to plead it, if it were a good defence, but the question is, whether it is such a defence or not? Now, as this is a demand founded on a deed entered into by the testator, and the covenants contained in it have been broken by him, those covenants could only be released by a deed. This is a mere parol agreement, and it does not appear to me, that it is any defence to the action. I am, therefore, of opinion, that there is no ground for entering a verdict for the plaintiff, but that he is entitled to judgment non obstante veredicto.

1841.

HARRIS

v.

GOODWYN
Administra-
trix.

1841.

HARRIS
v.
GOODWYN,
Administra-
trix.

COLTMAN, J.—The first question which the Court has to decide in this case is, how the record should stand, for that is preliminary to our deciding what the judgment should be, or whether, at the time of the trial, I should have directed the jury to find a verdict for the defendant. The defendant alleged, in her plea, that a promise was made; that was proved strictly in terms, or at least, it must be assumed that it was; and it is a strong proposition to say, that that being the case, the defendant was not entitled to a verdict. It seems to me, that I should have directed the jury wrongly if I had not directed a verdict for the defendant. Then the question is, whether the plea, which is on the record, is a sufficient answer to the declaration. That will depend upon how the plea is to be understood, whether it amounts to an allegation that the promise was under seal, because, if so, it would be a good answer to the action. As to what should be intended after verdict, there appears to be some difficulty in the case. *Buller, J.*, in the case of *Spiers v. Parker*, lays down the rule in a manner, which, if he is correct, would entirely remove the difficulty. He says, as to what is to be intended after verdict: “Nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. That is the case where a feoffment is pleaded without livery. A livery is always implied, because it makes a necessary part of a feoffment. I know of no decision against this rule. There is indeed a dictum, in a case which came before Lord *Hardwicke*, in this Court (*a*), which militates against it. That was an action to recover an amerciamment in an inferior Court, and the declaration did not state that the defendant was a resiant. There the Court held that residence must be presumed to have been proved at the trial, otherwise the jury could not have found that there had been any debt at all.” There are some other cases also, in which the

(a) Rep. temp. *Hardwicke*, 116, *Wicker v. Norris*.

Courts have gone a great way in making good a declaration, by supposing certain matters to have been proved, without which the judge would not have directed any damages to be assessed. Perhaps some of those cases may have gone a little further than is warranted. In this case, there is nothing alleged, but a promise, and if it is proved in the terms of the allegation, there being nothing to induce a supposition that any part of it was under seal. The cases adverted to, were all cases of declarations, and it is not easy to say whether that would furnish any ground of distinction. Here it is the simple case of a plea, and the only question is, whether that is proved in the terms in which it is stated? There is nothing at all to imply that it was the intention of the defendant to set up a deed, by way of defence, and under these circumstances, I think that the meaning of the verdict must be taken to be, that a parol agreement only was pleaded. On the grounds referred to by the Court, I think that is not a sufficient answer to the action.

1841.
 HARRIS
 v.
 GOODWYN,
 Administra-
 trix.

MAULE, J.—I am also of opinion, that the verdict in this case was properly entered for the defendant, and that the plaintiff cannot have it entered for him upon the ground set up. He says, that at the trial the plea should have been understood to mean that the promise alleged, which is put in issue by the replication, was a promise by deed under seal, because that would have been necessary to make the plea a good answer to the declaration. It is correct to say, that a plea which is pleaded, is to be understood in the sense in which it amounts to an answer to the action, because the plaintiff, by not finding fault with its form by demurrer, admits the facts stated in it, so far as to prevent him from complaining of the mode in which the facts are stated. But I do not find any case, in which it is held that you can supply an omission of a statement, in order to make the plea good, or that you can substitute anything for that which is stated for the same purpose. The rule, I take it,

1841.
 HARRIS
 v.
 GOODWYN,
 Administra-
 trix.

is not that you may supply anything; but that that which is said equivocally is to be understood in the sense which would make the plea good; and that which is alleged only by way of implication, is to be considered as alleged as effectively as by a direct statement, *Dean v. James* (a). That is not indeed a case after verdict, but after pleading over, which amounts to the same thing, and that case applies here. The allegation must be understood to be sufficient to make the promise such a one as would bind the party in every respect. The verdict in this case, therefore, I think is rightly entered. Then with respect to the arrest of judgment, the plea cannot be sustained. The covenant cannot be got rid of, without some release or accord executed. This amounts to an agreement, for the breach of which possibly the defendant may have a remedy, but which cannot be insisted upon, in such a case as this.

Rule accordingly.

(a) 1 N. & M. 392.

EVERETT and Another, Assignees v. WELLS.

To render a warrant of attorney void as against the assignees of a bankrupt, under the provisions of the 3 Geo. 4, c. 39, ss. 1 & 2, on the ground of its not having been filed, or judgment signed within twenty-one days of the date of its execution, it is not necessary

DEBT by the assignees of one Collis, a bankrupt, for 165*l.* 15*s.* 11*d.* money had and received by the defendant to the use of Collis, and on an account stated.

The defendant pleaded, by way of set-off, that the said Collis, the bankrupt, before and at the time of the bankruptcy, and before and at the time of the commencement of this suit, was and still is indebted to the defendant in a large sum of money, to wit, in the sum of 203*l.* 10*s.* upon a certain judgment which he, the defendant, heretofore, to wit, &c., on the 26th of November, 1838, recovered against the said Collis, &c., in a certain action on promises, whereby

that the petitioning creditor's debt shall have accrued within the same twenty-one days.

it was considered and adjudged that the defendant should recover against the said Collis the said sum of 203*l.* 10*s.*, for his damages which he had sustained, &c.

1841.
 EVERETT
 and Another,
 Assignees,
 v.
 WELLS.

The plaintiff replied, that the judgment in the plea mentioned, was a judgment obtained and recovered upon, and by virtue of a warrant of attorney, executed by Collis, after the passing of the act, 3 Geo. 4, c. 39, intituled, "An act for preventing frauds upon creditors by secret warrants of attorney to confess judgment." The replication then set out the warrant of attorney and defeasance, and further alleged that the said warrant of attorney and defeasance was not filed with the clerk of the docquets and judgments in the Court of King's Bench, nor was any judgment entered up thereon within the space of twenty-one days after the execution thereof. The replication further added, a statement of the proceedings in bankruptcy, from which it appeared that the petitioning creditor's debt accrued on the 30th of November, 1838, and that the fiat was issued on the 4th of December following, and then set out the plaintiff's title to sue as assignees under the fiat.

Rejoinder, that the warrant of attorney was executed on the 9th day of August, 1833, and that the said Collis, the bankrupt, was not indebted to the petitioning creditor under the commission, until after the expiration of twenty-one days from the time of the execution of the said warrant of attorney.

Demurrer to the rejoinder, for that it neither traversed, nor confessed and avoided the replication, but that it was wholly immaterial.

Channell, Serjt., in support of the demurrer. The effect of the rejoinder was to import into the statute a clause in the nature of a condition precedent, which its terms did not warrant. The 3 Geo. 4, c. 39, s. 1, provided, "That if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance

1841.
EVERETT,
and Another,
Assignees,
v.
WELLS.

and indorsement thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench, at Westminster, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other Court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the said Court of King's Bench." Section 2, enacts, "That if at any time after the expiration of the twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or copy thereof shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back, and receive for the use of the creditors of such bankrupt at large, all and every the moneys levied or effects seized under and by virtue of such judgment and execution." The object of this rejoinder was to make it a precedent condition that the petitioning creditor's debt should have arisen within the twenty-one days next after the execution of the warrant of attorney, to render the provisions of this statute applicable, but undoubtedly the act of Parliament contained no provision from which it could be supposed that this was the intention of the legislature, and the adoption of such a construction of the provisions of the clauses referred to, would be to frustrate the intention of the legislature.

Merewether, Serjt., in support of the rejoinder. The

only object with which the act was passed, was to prevent the mischievous consequences arising from secret warrants of attorney. The warrant of attorney was void by the provisions of the statute only as against the assignees, but if it were filed before the petitioning creditor's debt accrued, it was no longer a secret warrant of attorney as regarded that debt, within the mischief intended to be provided for. The judgment here was signed on the 26th November, and the petitioning creditor's debt did not accrue before the 30th of the same month. The judgment was good as against all the world up to the 30th November; and could the fact of a debt then arising alter the position of the present defendant? In the cases of *Morris v. Mellin* (a), *Bennett v. Daniel* (b), *Green v. Gray* (c), *Edmonds v. Lawley* (d), the statute had received a more liberal construction than that which was contended for on the other side. The act must receive a fair construction with reference to its objects, and the rights of the parties whom it was intended to affect. Some general words in statutes had received a qualification in cases which had been decided, and the terms of the act, in the present case, equally required consideration. *Tope v. Hockin* (e), *Hurst v. Jennings* (f).

1841.
 EVERETT
 and Another,
 Assignees,
 v.
 WELLS.

Channell, Serjt., in reply, was stopped by the Court.

TINDAL, C. J.—I do not see that we can put that construction upon this act which the defendant calls upon us to give to it, without adding to it a substantive proviso distinct from any which appears in it. The act says, that in all cases where a warrant of attorney is not filed until after twenty-one days from the time of its execution, if a bankruptcy shall take place, the warrant, and the judgment upon it, shall be deemed fraudulent and void, unless the judgment shall have been entered up or execution executed

(a) 6 B. & C. 446.

(b) 10 B. & C. 500.

(c) *Ante*, vol. 1, p. 350.

(d) 6 M. & W. 285.

(e) 7 B. & C. 101.

(f) 5 B. & C. 650.

1841.

EVERETT
and Another,
Assignees,
v.
WELLS.

within twenty-one days, and not after. We are called upon to say that this act is not meant to apply, unless the petitioning creditor's debt, on which the fiat issued, was an existing debt before the expiration of the twenty-one days; for the allegation in the rejoinder is, that the petitioning creditor's debt, on which the fiat issued, did not accrue until after the twenty-one days had elapsed. What is that but importing into this act of Parliament a clause which we do not find in it? But it is our duty never to add to nor diminish an act, nor to vary its apparent meaning, unless we see that the legislature must have meant something which they have not precisely expressed. It is said that no injury can happen generally by our giving this construction to the act. But it seems to me, that injury may happen, because, after twenty-one days have elapsed, supposing there is no petitioning creditor's debt within that time, and before the filing of the warrant of attorney, the person giving the warrant may control debts which may be within the commission, but the creditors would not, in that case, have the benefit of that publicity of the fact of the warrant of attorney having been executed, which it was the object of the act they should have. I think, therefore, that the plaintiff is entitled to judgment.

BOSANQUET, J.—I am of opinion that this case is within the words of the act of Parliament. The safe course for the Court to pursue, is to construe the act according to the plain and obvious meaning which it bears. I do not see any consistency between the construction which is contended for, and the purpose for which this act was passed. The act proposes to prevent the mischiefs which arise from secret warrants of attorney. It seems to me, that this really is to be treated as a secret warrant of attorney, security being given by the warrant of attorney, to enable the party to enter up judgment in the Court; time is given to him, during which he is allowed to keep that warrant in his own possession, and if he keeps it without putting it in

force within the time limited by the act, it is a secret warrant of attorney, and if he lets that time go by, it seems to me that it is within the mischief of the act. The warrant is not void altogether, but it is good against the bankrupt and all the world, except the assignees; but if the defendant becomes bankrupt, the assignees have a right to question the warrant, and to treat it as the act provides, as fraudulent and void against them. I see no ground, therefore, for restraining the obvious meaning of the act. It is intended to prevent that which is very mischievous, namely, the keeping secret a warrant of attorney. If the holder may keep it twenty-one days, he may keep it twelve months, and then, just before there is reason to suppose that the man is likely to have a fiat issued against him, he may carry it into the office and procure judgment to be entered up, and execution executed, for the purpose of defrauding all who are entitled to the benefits of the commission, and so prevent them from having a fair distribution of the bankrupt's effects. I think, therefore, that this case is within the words of the act.

1841.
 EVERETT
 and Another,
 Assignees,
 v.
 WELLS.

ERSKINE, J.—The provision of this act is, that if a creditor chooses to take a warrant of attorney from his debtor, he must either enter up judgment within twenty-one days, or file it within the same time, or else incur the mischief of the debtor committing an act of bankruptcy, and of a commission being sued out before he gets execution executed. It is said that the petitioning creditor's debt should arise before the warrant of attorney is filed; but there is no such provision contained in the act of Parliament, and I am of opinion that the plaintiff is entitled to judgment.

MAULE, J.—I think also that this rejoinder is bad, and that it amounts to an endeavour to introduce into the act a qualification which is not to be found in it. This is not at all the case of putting a construction on the words of a

1841.
 EVERETT
 and Another,
 Assignees,
 v.
 WELLS.

statute, in which a manifest incongruity exists, but the effect of giving the act the meaning which is contended for, would be to introduce a new provision, contrary to its plain and obvious intention.

Judgment for the Plaintiff.

SMITH v. BRANDRAM.

The plaintiff declared upon a guarantee by the defendant, and alleged that the defendant had requested him to lend to one R. B., the sum of 24*l.*, and that in consideration of the premises, and that he would lend and advance the further sum of 2*l.* per week, the defendant undertook to pay as well, the said sum of 24*l.*, and the said further sum of 2*l.* per week, and "such other sums as the said plaintiff should so lend and advance to the said R. B." The guarantee proved in evi-

dence, was in the following terms: "I beg that you will continue to advance the sum of 2*l.* per week to R. B., and I hereby engage to repay to you all moneys you may advance to him, in addition to the 24*l.* you have already let him have at my request:" *Held*, that there was a variance between the record and the guarantee, but that it was amendable under the provisions of the statute, 9 Geo. 4, c. 15.

The plaintiff, in his declaration, claimed not only the amount which he had advanced at the rate of 2*l.* per week, but the further sum of 138*l.* The defendant, at the trial, combated his liability to pay any part of the whole amount alleged to be due; *Held*, that he was prejudiced by the variance, within the provisions of the 3 & 4 Wm. 4, c. 42, s. 23, only so far as the amount of 138*l.* went, and that as to any part of his defence, directed against that claim, he was entitled to his costs.

THIS was an action of assumpsit, brought to recover several sums of money, advanced upon the guarantee of the defendant, by the plaintiff, to one Robert Boss. The plaintiff, in his declaration, alleged, that before and at the time of making the promises hereinafter mentioned, the defendant had requested him to lend and advance to one Robert Boss the sum of 24*l.*, and in consideration of the premises, and that the plaintiff would lend and advance to the said Robert Boss the further sum of 2*l.* per week, the defendant undertook and promised the plaintiff to repay him, as well the said sum of 24*l.*, so before lent and advanced as aforesaid, as the said further sum of 2*l.* per week, so long as the plaintiff should continue to lend and advance the same to the said Robert Boss, and such other sums as the said plaintiff should so lend and advance to the said Robert Boss as aforesaid. The declaration then went on to allege the advance of the sum of 14*l.*, at the rate of 2*l.* per week, and of the further sum of 138*l.* 6*s.* 9*d.* The defendant pleaded first, non assumpsit; secondly, a set-off; and thirdly, payment. The trial took place before

Coltman, J., on 27th of June, 1839, where the plaintiff put in a guarantee in the following terms:—

“MR. SMITH, April 26th, 1837.

“Sir:—I beg that you will continue to advance a sum of 2*l.* per week to Mr. Robert Boss, and I hereby engage to repay to you all monies you may advance to him, in addition to the 24*l.* you have already let him have at my request to this date.

“G. Brandram.”

He then produced evidence of the advance to Boss of 14*l.*, but offered no proof with regard to the advance of any further amount. The defendant, under his plea of non-assumpsit, combated the advance of the 14*l.* He also objected that there was a variance between the guarantee, which had been put in evidence, and the statement of the instrument in the declaration, for that the guarantee contemplated the advance of no more than 2*l.* per week, whereas the declaration alleged it to be an undertaking to pay all such other sums as should be advanced. For the defendant it was urged, that there was no variance, but that at all events the record was amendable under the statute of 3 & 4 Wm. 4, c. 42. *Coltman*, J., amended the declaration, by striking out that portion of it which the defendant contended was inconsistent with the guarantee, and a verdict was returned for the plaintiff for 38*l.*, leave being reserved to the defendant to move to enter a nonsuit.

Talfourd, Serjt., in Michaelmas Term moved accordingly, and a rule nisi having been granted,

F. Gunning now shewed cause, First, there was no substantial variance or repugnance between the guarantee and the mode in which it was set out on the record. The words “all moneys you may advance to him,” in the former, had no express reference to the 2*l.* per week only, but must be taken to include whatsoever sums should be advanced,

1841.
SMITH
v.
BRANDRAM.

1841.
SMITH
v.
BRANDRAM.

and there was nothing to shew that the defendant did not contemplate the repayment of all Boss might require from the plaintiff. [*Tindal*, C. J.—At that rate it would amount to an unlimited guarantee to repay whatever sums might be advanced, even though they should amount to thousands of pounds. One would think, however, that the guarantee was confined to the repayment of the 2*l* per week, for that is its general object, and in construing it, we must look at what the parties really meant]. Secondly, even if it were a variance, the record was amendable under the statute of 3 & 4 Wm. 4, c. 42, s. 23. That statute recited, that great expense was often incurred, and delay or failure of justice took place at trials by reason of variances as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial was had of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party could not have been prejudiced, and that it was expedient to allow such amendments as thereafter mentioned to be made on the trial of the cause, and then enacted, “That it shall be lawful for any Court of record holding plea in civil actions, and any Judge sitting at nisi prius (if such Court or Judge shall see fit to do so), to cause the record, writ, or document on which any trial may be pending before any such Court or Judge, in any civil action, or in any information, &c., when any variance shall appear between the proof and the recital, or setting forth on the record, &c., of any contract, custom, &c., in any particular or particulars in the judgment of such Court or Judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in part of the pleading where such variance occurs, and in every other part of the pleadings which it may be necessary to amend on such terms, as to payment of costs

to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement as such Court or Judge shall think reasonable." It was clear, that in this case the defendant could not have been prejudiced in the conduct of his defence by reason of this variance. He had gone to trial prepared to contest the whole claim set up by the plaintiff, and although, if he had taken witnesses to trial to combat the item of 138*l.* 6*s.* 9*d.* alleged to be due, the defendant might be liable to the costs of their attendance; it could not be said that he was prejudiced by the variance beyond that, because he had disputed his liability to any part of the amount claimed. The error, it was to be observed, was not one of omission, but one by which the defendant had been put only to additional expense, to which the plaintiff did not dispute his liability, *Stansbury v. Matthews* (a), *Duckworth v. Harrison* (b), *Hanbury v. Ella* (c), *Parker v. Ade* (d), shewed that the Court were disposed to put a liberal construction upon the statute.

1841.
SMITH
v.
BRANDRAM.

Talfourd, Serjt., and *Swann*, in support of the rule. It must be taken to be conceded, that the contract set out and that proved in evidence differed in substance, because the former was far more extensive than the latter, and the only question was, whether it was a case in which the judge at nisi prius was authorised, under the act, to amend the record? There were two requisites to enable the judge to amend; it was necessary, first, that the matter of amendment should not be material to the merits of the case; and, secondly, that it did not prejudice the defendant in his defence. The cases which had been referred to, were authorities only upon the latter point, and each depended upon its own peculiar circumstances. Upon the first point,

(a) *Ante*, vol. 7, p. 23. S. C. N. & M. 438.

4 M. & W. 343.

(d) *Ante*, vol. 1, p. 643; S. C.

(b) *Ante*, vol. 7, p. 463.

1 C. & M. 429.

(c) 1 Ad. & El. 61; S. C. 3

1841.
 SMITH
 v.
 BRANDRAM.

however, it was to be observed, that the proper construction to be put upon the guarantee was so obvious, that its erroneous statement must be deemed to be wilful. The claim set up was upon a contract entirely different from that which, in reality, existed. Had it been properly alleged, the defendant might have paid the 38*l.* into Court, but he was prevented from doing so, as the record stood, because, by such an act, he would have admitted the whole contract. The defendant, therefore, had been prejudiced; and even if the Court should be of opinion that the prejudice extended only to the costs, it must be taken to include the whole costs of the cause which had been incurred, entirely in consequence of the plaintiff's act.

TINDAL, C. J.—It appears to me, that in this case there was a variance between the instrument put in evidence, and the mode in which that instrument is stated in the declaration; but that it is a case in which the record might be amended under the statute 9 Geo. 4, c. 15 (*a*). That act is still unrepealed, and gives a wide power of amendment to the judge at Nisi Prius. The only question for us, is, whether the defendant was really prejudiced in consequence of the misstatement of the written contract? If, at the trial, the defendant had admitted that he was liable to pay the 38*l.*, I should have thought that the plaintiff would have been entitled to a verdict, but that the defendant should have had his costs from the time when the money might have been paid into Court. He made no such admission, however, but he fought against the payment of that, as well as of the larger amount. He may still, how-

(*a*) That statute provides, that every Court of record holding plea in civil actions, and any judge at nisi prius, (if they think fit) may cause the record, when a variance appears between any matter in writing, or in print produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith amended in such particular, by some officer of the Court, on payment of such costs, if any, to the other party as such judge or Court shall think reasonable,

ever, have been prejudiced in some respect, by his having witnesses in attendance to meet the demand for 138*l*., and so far as that prejudice extends, he is entitled to his costs. The rule for a nonsuit, therefore, must be discharged; but the defendant, on the taxation of the costs, is to be allowed so much as shall appear to the Master to have been caused by this misstatement by the plaintiff of his claim.

1841.
SMITH
v.
BRANDRAM.

BOSANQUET, J.—I am of the same opinion. There was clearly a variance between the record and the document produced in evidence; but at the same time I think it is a variance, in respect of which the learned judge was authorised to direct an amendment, in obedience to the statute. Let us see in what a situation would the plaintiff be placed, if an amendment in this case was not to be allowed. He has misconstrued the instrument, by supposing that it authorised him to demand from the defendant the whole of the money which he had advanced, and that it was not restrained in its operation to the amount of 2*l*. per week only. The defendant puts a different construction on the guarantee, and he says that the legal effect of it is an agreement to pay only so much as shall be advanced at the rate of 2*l*. per week; the defendant, in fact, introducing the word “such” before the word “moneys,” as conveying the real meaning of the guarantee, and in that I think he is right. The plaintiff then, it is to be observed, is prevented from putting more than one count upon the record^(a); and in what a position is he then placed? He must either give up the whole of the additional sum of 138*l*., to which he thinks he is entitled, and declare for 38*l*. only, or he must be entirely defeated, if he declares for the whole. It is the object of the act of Parliament to afford relief in cases of this description, and I think the case being brought within the spirit of the statute, the judge was right in allowing this

(a) R. G., H. T., 4 Wm. 4, s. 5; *ante*, vol. 2, p. 314.

1841.
SMITH
v.
BRANDRAM.

amendment. The guarantee, which is the contract declared upon, must have been very well known to the defendant. It is true that he construed it differently from the plaintiff, but the plaintiff has proved part of his demand, which the defendant resisted, and he is not to be turned round in consequence of this variance. The amendment, therefore, in my opinion, was authorised, care being taken the defendant suffers no prejudice in respect to those costs, which he really incurred in consequence of the variance.

ERSKINE, J.—I also think that the learned judge clearly, under the acts of Parliament, had the power to order this amendment at *Nisi Prius*, and that it was right that he should do so, because it is a case of a variance in the manner of setting out a written agreement, and the defendant had a full opportunity of knowing what the contract was before he went down to trial; and instead of his going down to defend the action, on the ground that there was too much claimed, he went down on the ground that the plaintiff was entitled to nothing. If he had admitted his liability to pay the 38*l.* at the trial, and had asked his costs up to that time, I think he would have been entitled to them, but he proceeded with his defence to that as well as the larger sum, shewing that his original contest was, not that the plaintiff claimed too much, but that he was claiming that to which he was not entitled at all. I think, therefore, the rule must be discharged, the defendant being allowed such costs as he may have incurred in respect of his preparing his defence to the claim for the 138*l.*

MAULE, J.—I also think that the rule, as proposed by the Lord Chief Justice, will do justice between the parties. The power of amendment under the act 9 Geo. 4, c. 15, extends to this case. Defendants, when they have declarations against them founded on written contracts, must know that they may be charged on the trial, not only with the contract as alleged in the declaration, but that that

contract may be the subject of amendment. If the defendant here had only combated the larger demand, the proper course would have been to give a verdict in favour of the plaintiff for 38*l*., and the plaintiff would have paid the defendant's costs; but he did not do that. He opposed the whole demand which was made, and he had the full benefit of a trial upon that subject, and he could not complain that, not having been successful, he must pay the costs. Those costs, however, to which he had been put by the plaintiff's declaring for a larger sum than he was entitled to recover under the guarantee, would be paid to him. The power of amendment, it was to be observed, was given in substitution for the power of having two counts, and the position in which the defendant was placed by this determination, was precisely that in which he would have been, if there had been two counts.

1841.
SMITH
v.
BRANDRAM.

Rule discharged; the costs to be paid by the Plaintiff.

LITTLE and Others v. NEWTON.

BOMPAS, Serjt., in Michaelmas Term, moved for a rule, calling upon the plaintiffs to shew cause why the appointment of arbitrators in this action should not be revoked, and why the submission of reference, and the rule and all subsequent proceedings had thereon, should not be set aside; or why the award made by the arbitrators should not be set aside, upon the grounds, first, that one of the arbitrators was appointed contrary to the agreement and understanding of the parties, and contrary to good faith; and, secondly, that the award was not made by any two

A cause and all matters in dispute, were referred to the decision of two merchants and a legal arbitrator; the arbitrators met, and two of them agreed, upon the merits, to find in favour of the plaintiff, but the lay arbitrators agreed to leave a point

of law, which had arisen, to the decision of the barrister. The legal arbitrator decided that point in favour of the plaintiffs, and executed the award at Birmingham, in accordance with his own views: On the next day, the award was executed in London by one of the lay arbitrators also in favour of the plaintiff: *Held*, that the award was bad as being a decision by one arbitrator, pursuant to a power delegated to him by the other arbitrators, they having no authority so to delegate.

1841.

LITTLE
and Othersv.
NEWTON.

arbitrators together, but that the same was made by two arbitrators, who signed the same at different times and in different places. From the affidavits, it appeared, that the parties had agreed to refer the cause to three arbitrators, of whom one should be a gentleman at the bar, while the other two should be merchants, but it was a term of the agreement that the barrister should not have acted or have been employed as counsel by the attorney on either side. Since the award had been made, it had been ascertained that the barrister had acted for the plaintiffs' attorney in the House of Lords. Upon this state of facts the first objection was founded. The second objection rested upon affidavits, which shewed that the award had been signed by the barrister at Birmingham, on the 20th July, and had been signed by the plaintiffs' arbitrator in London on the following day, neither of those arbitrators being present at the time of the execution of the award by the other. This, it was urged, was an informal execution of the award, which, on that ground, must be set aside.

The *Solicitor General*, on a subsequent day, shewed cause. He produced affidavits from the plaintiffs' attorney, in which the alleged agreement, upon which the first objection was founded, was denied to have been made. Upon the second point, he urged that every presumption was in favour of the award, and that the mere fact of the two arbitrators, by whom it was executed, being absent from each other at the period of its execution by each of them, formed no sufficient objection upon which the award would be set aside. He produced affidavits, from which it appeared, that the parties had agreed upon the general terms of the award before its execution, but that for the convenience of the legal arbitrator, their final determination was postponed, the object being that the learned gentleman might inquire into a point of law, which had been raised in the course of their investigation.

Bompas, Serjt., and *Bramwell*, in support of the rule, admitted that the first objection was answered by the affidavit produced. Upon the second objection, they urged that the judgment of the two arbitrators ought to have been given in combination. *Rex v. Forrest* (a) was a case which bore upon the question under consideration, and that and other authorities shewed, that where an act was to be done by two parties of a judicial nature, it must be done by them together. *Rex v. Anstell Ridgway* (b).

1841.
 LITTLE
 and Others
 v.
 NEWTON.

Cur. adv. vult.

On the last day of Term,

TINDAL, C. J., said: We cannot help thinking that this case is encompassed with great difficulties. No authority of any court of justice has been cited to the Court, where a state of facts appeared, like that which exists here, where the arbitrators, after they had met together to consider what their award should be, signed it subsequently at two different periods. At present we have not come to any decision upon the subject, and we shall enlarge the rule until the next Term, giving the parties the opportunity in the meantime to prepare fresh affidavits, and to state more clearly the matter as it occurred. We think at present that it is rather matter of misfeasance than of no award, but it is evident that the affidavits do not give a full account of what occurred. In the meantime, I will refer the parties to the case of *Goodman v. Sayers* (c), suggested by my brother *Maule*, which has a very strong bearing on the case.

The *Solicitor General*, *E. V. Williams*, and *W. H. Watson* now appeared to shew cause. Fresh affidavits had been filed, and the facts as they now appeared were as follows:—the plaintiffs and defendant were merchants in

(a) 3 T. R. 38.

(c) 2 Jacob & Walk. 249.

(b) Ibid. p. 380.

1811.
—
LITTLE
and Others
v.
NEWTON.

London, carrying on business under different firms, and certain matters of dispute having arisen between them, on the 15th January, 1840, they entered into an agreement, referring an action, pending in this Court, as well as certain other matters in dispute, to the decision of three arbitrators; the barrister before alluded to, J. M'Lure, and J. Hart, merchants of London, any two of whom might make an award. This agreement was made a rule of Court, and the business of the arbitration commenced; several meetings were held, at which witnesses were examined, and books inspected, in pursuance of the powers conferred upon the arbitrators. On the 8th July, a meeting was held, after which the legal arbitrator wrote to Messrs. M'Lure and Hart, requesting them to be prepared to give him their decisions upon the case upon the 14th of the same month, on which day it was determined that their final meeting should be held. At that meeting, Mr. M'Lure was first called upon for his opinion, when he declared himself to be in favour of the plaintiffs upon the whole case; Mr. Hart was then required to state his views, and he entered fully into the case, giving his reasons for the opinion which he had formed, which was partly in favour of the plaintiffs, and partly in favour of the defendant. There was a point of law, with regard to the dishonour of a bill of exchange, upon which it was determined that the legal arbitrator should decide; and finally the meeting broke up, the legal arbitrator, according to the statement of Mr. Hart, having expressed no opinion upon the merits, but having observed that he supposed that whatever gentleman he disagreed with, would not execute the award; to which both Mr. M'Lure and Mr. Hart assented; but according to the affidavit of the plaintiffs' attorney, and the statement of the barrister himself, having declared himself to be with the plaintiffs on the merits. On the 19th July, the clerk to the barrister wrote from Birmingham to Mr. Hart and Mr. M'Lure, informing them that the legal arbitrator intended

to make his award on the next day, and requesting their attendance at his chambers on the 21st July. On that day, the two lay arbitrators met accordingly, and the award was found by Mr. M'Lure to have been executed by the legal arbitrator in favour of the plaintiffs, and he immediately appended his signature to it; and on Mr. Hart's arrival, he ascertained that the award was completed, but he was refused a copy of it, or to see it, and he did not see it until after it had been taken up. It was now contended, that the award having been executed according to the conclusion arrived at on the facts, at the last meeting of the arbitrators, the parties had secured the object of their submission to reference—the judgment of the arbitrators upon the case. The fact of a point of law having been reserved for decision by the legal arbitrator, was immaterial, because the very circumstance of his appointment shewed the anticipation of the parties, that such a point would arise, and it was evident that when such a question did arise, it must be left to a legal person to decide. The concurrent opinion of two arbitrators was obtained, at the meeting on the 14th July, and Mr. Hart and Mr. M'Lure were aware when they parted, that the barrister was about to quit town, and they left it to him to say how the point of law should be settled. The presence of the two lay arbitrators at the time of his announcing his views on that point, could not affect the final determination of the case, and the mere circumstance of the two arbitrators having finally signed the award at different places was immaterial. The case of *Goodman v. Sayers* shewed, that where the substance of an award had been settled in the presence of three arbitrators, the fact of one of them not being summoned at the time of its execution by the other two, was not a sufficient ground for setting the award aside. In *Battye v. Gresley* (a) which was a case arising under the 1 Jac. 1, c. 15, the

1841:
 LITTLE
 and Others
 v.
 NEWTON.

(a) 8 East, 319.

1841.
LITTLE
and Others
v.
NEWTON.

question was, whether a warrant to compel the attendance of a witness had been properly issued, and Lord *Ellenborough* said, "The commissioners ought to hold counsel together, and agree upon the substance of the warrant, whether or not it shall issue; but here I consider that they had exercised together every material act of judgment, including the direction of the warrant. * * * So that when it came before them for their signatures, nothing else should remain to be done, except the mere act of signing it; and this need not be done together. Suppose each, immediately after writing his name, had left the room where they were assembled in the first instance, would that have avoided the warrant? Then why not sign it alone in any other place?" Upon these grounds it was urged that the rule must be discharged.

Bompas, Serjt., and *Bramwell*, in support of the rule. The result of the affidavits shewed that the lay arbitrators had referred the final determination of the case to the barrister; they delegated their authority to him, but they had not the power to do so, and the award was vitiated by that act. It was not sufficient for them to come to the same determination upon the case, but they must arrive at their conclusion together, and the proof that they had done so, was only to be afforded by their execution of the award at the same time and place. Until the award was signed, it was open to either arbitrator to change his opinion; it was possible that one of them might have done so, after their final meeting, and before the execution of the award; and the necessity, therefore, of the expression of their concurrent opinion at the period of the conclusive settlement of the question, which could only be effected by the actual execution of the award, was obvious. Here, however, there was not even a concurrence between any two of the arbitrators at any time of their meeting, because, when the last meeting took place, the point of law was not

decided, and they did not afterwards commune together so as to come to any concurrent conclusion upon that point. If, therefore, the question was to be decided upon the concurrence of opinion of the arbitrators, the award was bad; and it was equally bad, if the decision of the Court should rest upon the more formal point of its execution by two of the three arbitrators at the same time. They also cited *Rex v. Inhabitants of Great Marlow* (a).

1841.
 LITTLE
 and Others
 v.
 NEWTON.

Cur. adv. vult.

TINDAL, C. J., on the 30th of January, delivered the judgment of the Court—In this case, a rule has been obtained, calling upon the plaintiffs to shew cause why the award which has been made should not be set aside; and this, upon two grounds. It is unnecessary now to advert to the first objection which was raised. It was one of fact, and appeared to us, in the course of discussion, to be answered upon the affidavits. But the second objection, which stood over for further consideration, was, that the award had not been made by any two of the arbitrators together, and that it was, therefore, void. If this objection had rested on no other ground than this, that the two arbitrators who signed the award, after having agreed upon the terms of it when they last met together, had affixed their respective signatures thereto in different places, and at different times, we might have hesitated in holding the award void on that objection: but on looking at the affidavits in this case, we think that the objection is of a more serious description. It appears that the result of those affidavits is, that after the three arbitrators had met and received evidence, and had heard the parties, a meeting took place on the 14th of January between them all, for the purpose of considering the evidence, and determining the matters sub-

(a) 2 East, 244.

1841.
LITTLE
and Others
v.
NEWTON.

mitted to them. At this meeting, it was agreed that the award should be for the plaintiff for a certain sum stated, subject to the decision of two points, namely, first, whether the plaintiffs were responsible for the acts of certain parties at Calcutta; and secondly, whether due notice of the dishonour of a bill of exchange had been given. At this meeting, the plaintiffs' arbitrator declared his opinion that the full amount claimed by the plaintiffs should be paid to them, subject to the opinion of the legal arbitrator upon the point of law, whether due notice of dishonour had been given; which question was left solely to his decision. The defendant's arbitrator declared that his opinion on the case differed in many respects from that of the plaintiffs' arbitrator, but declined giving any opinion upon the point of law, which was referred to the legal arbitrator. The legal arbitrator, before the breaking up of the meeting, declared his opinion to be with the plaintiffs on the merits, and that they were not responsible for the acts of the parties referred to. He then, however, gave no opinion upon the point of law, but expressed his wish to look into the authorities upon that subject, in order that he might make up his mind upon it, adding at the same time, that he supposed that the gentleman with whom he disagreed would not sign the award, to which each of the other arbitrators answered, that he would not. The award was then drawn up by the barrister, upon the principles stated by him in the presence of the two other arbitrators, with the addition only of his decision on the point of law. The award was signed by him at Birmingham, and was sent to London, and letters were sent to the other arbitrators to attend at Chambers to execute the award. They did attend on the following day, and it was executed by the plaintiffs' arbitrator; but it was not then shewn to the defendant's arbitrator, although he received a copy of it after it had been taken up. The question is, whether, upon this state of facts the award is good? It is clear, that the parties to the submission of re-

ference had a right to the joint judgment of the two arbitrators, who signed the award, upon each and every point embraced by it, after a communication between them, so as to insure their agreement of mind on each point. But here the determination of the point of law appears to have been the judgment of the legal arbitrator alone, who made no communication as to the point at which he had arrived to either of the others, but made up his mind and signed the award before any such agreement had taken place. The award thus signed, was signed by another arbitrator, and was not shewn to the third until after it was executed. It is true, that both the arbitrators named by the plaintiffs and the defendant had declined interfering with the question of law, and had given up their opinion on that point to the third arbitrator. But there is no principle of law which will authorize such a delegation of their opinion, and it is impossible to say, but that if the legal arbitrator had expressed his opinion to the others before the award was signed, some arguments might have been raised which would have produced a different result. It appears, besides, that the costs of the award which were submitted to reference, did not form the subject of discussion or communication between the arbitrators. On these grounds, we are compelled to say, certainly with considerable reluctance, that the rule for setting aside this award must be made absolute.

1841.
LITTLE
and Others
v.
NEWTON.

Rule absolute accordingly.

1841.

KEMBLE v. MILLS (a).

The plaintiff declared in assumpsit upon articles of partnership, entered into between him and the defendant, by which the defendant undertook to pay to the credit of the concern, 5000*l.* : the plaintiff undertook to pay 2000*l.* or thereabouts, and to make certain arrangements with regard to the premises in which the business was to be carried on : the agreement then provided, that if the plaintiff brought in less than 2000*l.*, the residue of that amount should be made

up from the profits accruing due to him out of the business, that after the 2000*l.* had been so paid, a further sum of 3000*l.* should be paid by the plaintiff, either in money or by the deduction of one-third of his profits; that a license should be obtained by the plaintiff at his own expense : that the banker's account should be under the control of the defendant, as well as the employment of the clerks and servants, and the regulation of the general business accounts : The declaration then averred the plaintiff's readiness and willingness, well and truly to keep his part of the contract, and the performance of certain acts in pursuance of its provisions, but alleged that the defendant had not paid the 5000*l.* into the concern, in pursuance of the agreement. The defendant pleaded that the plaintiff had not procured the said license, and had not paid the 2000*l.* into the concern, at any time before the commencement of the suit.

Held ill on demurrer, and that the procurement of the license, and the payment of the 2000*l.* were not conditions precedent to the payment by the defendant of the 5000*l.*

Held also, on general demurrer, that it was sufficient for the plaintiff to aver his readiness and willingness to perform the contract, without an allegation of its actual performance.

A count on a banker's check alleged that it had been drawn by the defendant upon a banking firm ; that it had been presented for payment, and had not been paid ; that the bankers had no effects of the defendant, and that the defendant had sustained no damages by reason of his having received no notice of dishonour of the check : *Held*, on general demurrer, that the declaration disclosed a sufficient excuse for the want of notice of dishonour.

(a) This case and that of *Clark v. Morrell*, which follows, were decided in Michaelmas Term, but were omitted in their proper place.

gagee's interest in the said premises should have ceased, that the plaintiff should grant a lease thereof to the firm, at a yearly rent of 410*l.*, including the ground-rent payable thereon, for a term of fourteen years, or upwards, provided the defendant so requested, and not otherwise; that the said premises might be purchased at any time during the said term of forty-seven years, at the cost of the firm, for a sum of 4500*l.*, subject to the approval of the defendant, and not otherwise; that provided the plaintiff brought in a less sum than 2000*l.* to the concern, then the whole amount of the profits arising upon his shares should be kept and retained in the concern, until the sum paid in, should, together with such profits, amount to the sum of 2000*l.*; that after the said sum of 2000*l.* should have been made up by the said retention of the profits arising to the plaintiff, or otherwise, then that one-third of the profits of the plaintiff should be reserved, until the further sum of 3000*l.* should accrue to his account, such sum of 3000*l.*, together with the 2000*l.* before-mentioned, to be kept in the concern for the purposes of the partnership; that a license should be obtained from Mr. Derone, by the plaintiff, at his own proper costs and charges; that the banker's account should be kept in the name of the defendant, or otherwise, as he might direct; that all purchases should be made by the defendant, or by his direction; that the account should be kept by the defendant, or by a person or persons under his direction, and that the defendant should have the power of appointing and discharging the clerks and other servants of the partnership at his discretion. The declaration then alleged, that the said articles of partnership having been made as aforesaid, afterwards, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform and fulfil the same on his part; the defendant then promised the plaintiff to perform and fulfil the same on his part; that after the making of the said articles of partnership and of the said promise, it was mutually agreed be-

1841.

KEMBLE

v.

MILLS.

1841.

KEMBLE
v.
MILLS.

tween the plaintiff and the defendant, that in the place and stead of procuring the said residue of the interest of the said mortgage in the said premises, as in the said articles of partnership mentioned, the said plaintiff should procure a lease of the said premises, for the term of seven years, to commence at Christmas then next ensuing, determinable at the end of each or either of the first three years, by six months' notice in writing, by the said defendant; the said lease to contain a clause that the said defendant might, at any time during the continuance of the said term of seven years, purchase the whole of the said mortgagee's interest in the said premises, at or for the price of 2500*l.*, upon his giving six months' notice in writing of his intention to do so; and although the said plaintiff had been always ready and willing to procure such lease, whereof the said defendant had notice, and although the said plaintiff had been always ready and willing, in all other respects, well and truly to keep and perform the said agreement, in all things, on his part to be kept and performed; and although the said plaintiff and the said defendant did become co-partners in the said trade or business, and then entered into the occupation of the said premises, in the said articles of agreement mentioned, as such co-partners, and continued co-partners, and so in the occupation of the said premises, from the time of making the said agreement, until the 1st day of September, 1839, and during that time expended divers large sums of money in and about the alteration and improvement of the said premises, for the more advantageous carrying on of the said trade or business; and although a reasonable time for the said defendant to place to the credit of the said concern the said sum of 5000*l.*, in the said articles of agreement had elapsed, long before the commencement of this suit, yet that the defendant did not so place the said sum of 5000*l.*, or any part thereof, to the credit of the concern, to the damage of the plaintiff, &c.

The declaration contained a second count, upon a banker's check for 60*l.*, made by the defendant on the London and

1841.

KEMBLE

v.
MILLS.

Westminster bank, and delivered by him to the plaintiff, and alleged that the London and Westminster bank did not pay the same when it was presented, and that the said London and Westminster Bank had not in their hands any effects of the defendant, nor had they received any consideration for the payment, by them, of the said draft or order; and that the defendant had received no damage by reason of his not having had notice of the non-payment of the said draft by the said London and Westminster Bank.

The defendant pleaded, thirdly, to the first count in the declaration, that to obtain the said license, in the said first count mentioned, was an essential preliminary to the success of the said trade, and that, until the said license was procured, the said business could not be safely engaged in or undertaken by the said defendant, of which said premises the said plaintiff had notice; and that the said plaintiff, in consideration that the said defendant would enter into the said partnership with him, for the purposes aforesaid, did then promise and stipulate to procure, at his own proper costs and charges, the said license, from the said Derone, in the said first count mentioned; yet that no such license was at any time, before the commencement of this suit, obtained by the said plaintiff, from the said Derone. Verification. The defendant pleaded, fourthly, to the first count in the declaration; that the plaintiff did not at any time, before the commencement of this suit, place to the credit of the said concern, the said sum of 2000*l.*, or any sum or sums whatsoever, according to the said agreement in the said first count of the said declaration mentioned and stipulated. Verification. The defendant demurred, generally, to the second count in the declaration, stating, that the ground of demurrer was, that the reasons alleged in that count to excuse the want of notice of dishonour of the defendant's check, were insufficient. The plaintiff demurred to the third and fourth pleas of the defendant, assigning for cause, that the matters contained in those pleas respectively, did not amount to any answer to the

1841.

KEMBLE

v.

MILLS.

declaration, the said matters, the non-performance of which was complained of, not being conditions precedent to the performance of the stipulations of the agreement by the plaintiff.

Cleasby, for the plaintiff. The question for the decision of the Court upon the fourth plea was, whether the plaintiff was bound to perform those stipulations contained in the agreement affecting him, before the defendant brought in the sum of 5000*l.*? The effect of the agreement shewed clearly that such was not the intention of the parties, because it provided, that in case the 2000*l.* to be paid in by the plaintiff, were not so paid in, the profits derived from his share of the business should be applied to the liquidation of the claim of the concern to that amount, and there was no provision, express or implied, to shew that the payment of the 2000*l.* by the plaintiff, must take place before the payment of the 5000*l.* by the defendant. But the plea was also bad, because it contained no averment, that the plaintiff had been requested to bring in the 2000*l.*, nor any allegation that the defendant was ready and willing to bring in the 5000*l.*, in case the plaintiff had performed his part of the agreement. *Varley v. Manton* (a) was in point. The allegations in the declaration amounted to an averment, that the plaintiff was ready and willing to bring in the 2000*l.* so soon as the defendant had paid in the 5000*l.*, and the Court would hardly suppose that it was the intention of the plaintiff to throw 2000*l.* into the hands of the bankers of the firm, when there was a distinct proviso that the banker's account should be entirely under the management and control of the defendant. The third plea was also bad. It referred to the procurement of the license, and it contained some introductory allegations which were immaterial, as every stipulation contained in an agreement was presumed to be essential. The real object of the plea was to set up a non-

(a) 9 Bing. 363 ; 2 Moo. & Scott, 484.

performance of the agreement of the plaintiff by reason of his omitting to obtain a license. [*Maule, J.*—The plea contains no allegation that a reasonable time had elapsed for procuring the license]. Nor did it say anything but that it had not been obtained, so that its effect must be taken so to be, that the procurement of the license was the first thing to be done. It alleged that it would be useless to undertake the business until the license had been procured; but that was a mere matter of opinion, upon which issue could not be taken. But at all events, that was but a partial failure of the consideration, for the plaintiff had done much in the way of completing the agreement, and the partial failure of the consideration would not prevent his recovering, *Pordage v. Cole* (a), *Campbell v. Jones* (b), *Carpenter v. Cresswell* (c). The same objection also applied here which had been urged with respect to the fourth plea, namely, that the plea contained no averment that the plaintiff had refused to procure the license, or that the defendant would advance the 5000*l.* if it was procured. It could not be said that in order to entitle the plaintiff to bring this action, he ought to have burdened himself with the license, when, perhaps, no partnership might take place after all. With regard to the defendant's demurrer to the second count in the declaration, the general rule was, that want of effects excused notice in such a case as was here alleged. If the defendant had any reasonable ground to expect that the draft would have been paid, it should have been alleged, but where no such reasonable anticipation existed, it was sufficient for the plaintiff to aver non-payment, even without attempting to offer an excuse for the absence of notice of dishonour. The plaintiff had stated all the facts within his knowledge, for he could not know what ground the defendant had to believe that the draft would be paid, and the rule, that the party who knew the facts must state them, applied here. In a case of infancy, the plea merely

1841.

KEMBLE

v.
MILLS.

(a) 1 Wms. Saund. 320, c., n. (3).

(c) 4 Bing. 409; 1 Moo. &

(b) 6 T. R. 570.

Payne, 66.

1841.

KEMBLE

v.

MILLS.

alleged the *primâ facie* answer to the action, without going on to state that the articles supplied were not necessities, and the case fell within the principle laid down by *Tindal*, C. J., in *Fitzgerald v. Williams* (a), that it was not incumbent on the party to meet every possible case which might arise.

Shee, Serjt., for the defendant. The second count in the declaration was bad. There was no authority to shew that the plaintiff was at liberty to omit all excuse for giving no notice of dishonour. The case of *Fitzgerald v. Williams* had been relied upon, but there, the declaration did contain a distinct averment, that the defendant had no ground for supposing that his bill would be paid. Most of the cases, which had been decided, were upon bills of exchange, between which and drafts, there was a great distinction. *Treacher v. Hinton* (b), pointed out the distinction to be this, that in the case of a bill of exchange, the person by whom it is payable, is an agent, while in the case of a draft, it is made payable by an individual who is the debtor of the person drawing it, and upon whom it is adversely drawn. The omission of an excuse had been repelled in all the reported cases, *Orr v. Maginnis* (c), *Blackhan v. Doran* (d). [*Tindal*, C. J.—This is a general demurrer only. The defendant might have demurred specially, if he had been dissatisfied with the form of the allegation]. With regard to the pleas, the matters referred to in them, the payment of the 2000*l*. and the procurement of the license, were both conditions precedent. The intention of the parties, as collected from the agreement, must govern the case, *Stevens v. Curliny* (e). The object here was to set up a partnership, but to carry out that object, the money must have been paid into the concern. [*Maule*, J.—How much of the 2000*l*. should have been paid in?] So much as would be obviously a fair compliance with the terms of the agree-

(a) 5 Bing. N. C. 68; 8 Scott, 271.

(d) 2 Camp. 503.

(b) 4 B. & Ald. 413.

(e) 3 Bing. N. C. 355; 3 Scott,

(c) 7 East, 358.

740.

ment. But supposing that this was not a precedent condition, there was no averment of actual performance of the terms of the agreement by the plaintiff, but only a declaration of his readiness to perform its stipulations. In *Varley v. Manton*, there was an allegation of actual performance, according to the terms of the agreement. But the procurement of the license was also a condition precedent. If the business could not be carried on without it, surely that was sufficient to shew that it was necessary to be first procured. [*Maule, J.*, What does the “successfully” carrying on the trade mean? Does it mean the return of a large or a small profit?] Any reasonable profit might answer the words, but the allegation shewed that the business could not be carried on at all without the license. He also cited *Glaxebrook v. Woodrow* (a).

1841.

KEMBLE
v.
MILLS.

TINDAL, C. J.—This is an action brought on an agreement between the plaintiff and the defendant, by which they stipulate to enter into partnership together, and to trade in the business of refiners of sugar and molasses; and the first part of the agreement is, that the defendant shall place to the credit of the concern the sum of 5000*l.*, and that the plaintiff shall place to the credit of the concern the sum of 2000*l.*, “or thereabouts.” This last expression shews, that it was not intended that the whole amount of the plaintiff’s capital should be advanced at once, because the provision of the agreement is, that the amount paid in shall be “about” 2000*l.*; and that if the whole sum of 2000*l.* is not paid, the entire amount of profits to which the plaintiff would be entitled, shall be retained until that amount is paid. The agreement then contains provisions that the further sum of 3000*l.* shall be paid into the concern by the plaintiff, upon certain terms; that he shall procure a license at his own cost; that he shall make certain arrangements as to the business premises; that the banker’s account shall be kept in the name of the defendant; that

(a) 8 T. R. 366.

1841.

KEMBLE

v.

MILLS.

the defendant shall make all purchases, and shall appoint all clerks and servants. Now, the breach which is alleged of this agreement is, that the defendant did not bring into the concern 5000%, or any part thereof, although a reasonable time for doing so had long since elapsed, before the commencement of the suit. The defendant's answer is twofold: First, he says that the license which was necessary to be procured, he, (the plaintiff) did not procure. The third plea, which alludes to this, alleges, that "to obtain the license in the first count mentioned was an essential preliminary to the success of the said trade; and that until the said license was obtained, the said business could not be safely engaged in or undertaken by the said defendant; and that the plaintiff, in consideration that the defendant would enter into partnership with him for the purposes aforesaid, did then promise and stipulate to procure, at his own costs, the said license from the said Mr. Derone, yet no such license was at any time obtained from the said Mr. Derone, before the commencement of this suit." Now, if obtaining a license was a condition precedent to the entering into partnership by the defendant with the plaintiff, this would be a good answer to the declaration, and the question becomes this, on the face of the declaration, can we say that the procurement of this license was necessary before the 5000% was paid in by the defendant? The first observation which presents itself is, that there is no time specified at which the license was to be obtained, and although it would be reasonable to say that it would be necessary to have the license before they began business, yet as there was much to be done preliminary to their entering into business, such as the preparation of the premises, and more especially the funding of money to draw upon, it by no means follows that this was the first thing to be done; but on the contrary, it is reasonable to say, that there is nothing which binds the plaintiff, in the first instance, to procure the license. It would be expedient in the first instance, to procure the license, and it is so alleged; but it is to be remarked, that it might have

1841.

KEMBLE

v.
MILLS.

turned out that the parties could not subsequently have raised the money, or have procured the necessary premises for carrying on the trade of the partnership, and so the partnership might have gone off; and I think that there is nothing to shew that the license was necessary to be first obtained; and I am of opinion that the parties must have contemplated the procurement of the license as a condition concurrent and not precedent. The next answer to the declaration is, "that the plaintiff did not, at any time before the commencement of the suit, place to the credit of the said concern the said sum of 2000*l.*, or any sum or sums whatever, according to the agreement." Here, the question again turns upon a similar point; namely, was it a condition precedent that the plaintiff should place the 2000*l.*, "or thereabouts," to the credit of the concern, before the defendant deposited his 5000*l.*? So far as I can understand the contract, these acts were both to be done at one and the same time, as nearly as possible. Then, as that is the case, and as the plaintiff avers that he was ready and willing to perform his part of the contract, of which the defendant had notice, I think that he is in a condition to maintain this action by reason of the non-performance of the contract by the defendant; and if he had not been so ready and willing, as he alleges, the defendant might protect himself against the suit by joining issue upon this declaration. Then there is also in this declaration a count on a banker's check, to which payment is stated to have been refused; and it appears that no notice of dishonour was given to the defendant. The plaintiff, however, has stated in his declaration that which he thinks to be matter sufficient to excuse him from such notice, and it is observed, that the suggestion of the insufficiency of this allegation is made only on general demurrer. The allegation is this: "That the defendant made his draft in writing on the London and Westminster Bank for 60*l.*, and delivered the same to the plaintiff, but that the London and Westminster Bank did not pay the same when it was presented; and

1841.

KEMBLE

v.
MILLS.

that the said London and Westminster Bank had not in their hands any effects of the defendant, nor had they received any consideration for the payment by them of the said draft or order, nor had the defendant sustained any damage by reason of his not having had notice of the non-payment of the said draft." The objection that is taken is this, that there is one possible case in which, by certain decisions which have taken place, the party is still bound to present his bill for payment; and it is said, that although the defendant may not have had effects in the hands of the drawee, still that he had great and reasonable expectations that the draft would be paid by assets which were coming into the hands of the drawee before the instrument became due, and that, therefore, the holder of the draft was bound to give notice. But, it appears to me, that in this case, where there is a general demurrer only, a sufficient excuse appears upon the face of the record. And upon this broad ground, upon which all these decisions are founded, that if the defendant had intended to except to the want of excuse which he now sets up, he should have placed it before the Court as matter of form. There is a broad and sweeping allegation here, that the drawee had nothing in his hands to pay the amount for which the draft was drawn, and that the defendant has suffered no inconvenience by reason of no notice having been given. That is the true ground on which the early cases have been decided, and on which the want of notice has been excused. The same rule must prevail in this case, and upon the various grounds which I have stated, I think that the plaintiff is, in this case, entitled to judgment.

BOSANQUET, J.—I am also of opinion that the plaintiff is entitled to judgment. The complaint made in the declaration is, that the defendant has not brought in the 5000*l.* stipulated for; and on the part of the defendant, there are two pleas, in the first of which he contends, that the plaintiff ought to have shewn that he had procured the license

1841.

KEMBLE
v.
MILLS.

agreed to be obtained by him, that that is a condition precedent to his maintaining this suit; while in the second, he urges that the plaintiff has not paid in the 2000*l*. or thereabouts, stipulated for, to the credit of the concern. I agree with the Lord Chief Justice, that neither of these matters amounts to a condition precedent, and that is, in my opinion, easily to be determined, by looking at the general object of the agreement entered into between the parties. By the agreement, various things are stipulated to be done between the parties. I do not find that either of these matters pointed at by the pleas is so expressed as to lead the Court to a just inference that it was necessarily to be performed by the plaintiff, before he could call on the defendant to perform those duties, which were imposed upon him. The first in order in the agreement is, that the defendant should place to the credit of the concern the sum of 5000*l*., and then that the plaintiff shall place to the credit of the concern the sum of 2000*l*. or thereabouts. It is not stipulated which shall take precedence, and it is remarkable that no exact sum is stipulated to be paid in by the plaintiff. Then there is an agreement that the profits due to the plaintiff for his share shall be detained in order to make up the amount of his capital, so that certainly that capital is to be brought in after that of the defendant. I cannot find anything to shew that the capital of the plaintiff is to be brought in before that of the defendant; and if that is so, there is no necessity for the performance of the agreement by the one before its performance by the other. As to the license, it is said, by the articles of agreement, that it is to be procured by the plaintiff at his own cost; and the plea states that it was an essential preliminary to the successful carrying on of the business, that it should be procured. Now the plaintiff certainly stipulated to procure the license; but when? It does not appear that that was to be the first transaction which was to take place. The partnership was to be entered into; was to be actually formed; the object of it was the carrying on of a certain trade and

1841.

KEMBLE

v.
MILLS.

business on certain premises. It appears that expenses were incurred by the plaintiff in fitting up those premises, and until they were fitted up the business could not be carried on. Then, why should the license be procured before the premises were in a condition to be employed for the purpose intended? The license, when procured, must be paid for, and if after that, it had turned out that it could not be used all the money would be lost. I think, therefore, that there is nothing on this record, from which it can be collected that it was the intention of the parties that the procurement of this license should be a condition precedent to the defendant's fulfilment of the terms of the agreement. With regard to the second count in the declaration, the question is, whether a sufficient excuse is shewn for the plaintiff not having given notice of dishonour to the defendant of his draft? The averment is made in the terms ordinarily in use, and it appears to me that this is sufficient, at least on general demurrer, to afford an excuse for not giving notice of dishonour.

COLTMAN, J.—I am not able to see anything in this case which makes the payment of 2000*l.*, or “thereabouts,” specified in the declaration, or the procurement of the license mentioned in the agreement, conditions precedent to the payment by the defendant of the 5000*l.*, agreed by him to be paid, to the credit of the concern in which he and the plaintiff were about to embark; but I think, that the liabilities of the parties are in their nature to be considered as concurrent, and that there is no reason why the plaintiff should pay the sum of 2000*l.*, unless the defendant was ready and willing to pay the sum of 5000*l.* If they are concurrent liabilities, here is an allegation that the plaintiff is ready and willing to perform his part of the contract, and pay the sum of 2000*l.*, and perform the other necessary parts of his agreement; and there are cases to decide that where, in such cases, the conditions are concurrent, it is sufficient to allege a readiness and willingness to perform them. The

second part of the case refers to the non-procurement of the license by the plaintiff. In this case, it is contended, that the procurement of the license is to be considered as a condition precedent; but it seems to me that it would be a very unreasonable thing to call on the plaintiff to incur an expense in procuring the license, before he was satisfied that the defendant was ready and willing to perform his part of the agreement. That shews, therefore, that the liability of the parties in this respect are concurrent, and the allegation of the plaintiff, that he was ready and willing to perform the agreement, is sufficient to satisfy his undertaking. With regard to the second count of the declaration, I think that the allegations which it contains are sufficient to excuse the plaintiff for not giving notice of dishonour. The allegation is in the usual form adopted, and in a form which seems to me to be sufficient, at least on general demurrer. It is, in such cases, generally sufficient to shew that which is a *prima facie* excuse, and if there are any grounds for saying that it is not sufficient, it should be brought before the Court by the other party. Considering that this is the form, which has been used for many years, I cannot see any reason to entertain a doubt as to the propriety of the allegations made.

MAULE, J.—I also think that the judgment of the Court should, in this case, be given for the plaintiff. There are demurrers to two of the defendant's pleas. First, as to the non-procurement of the license by the plaintiff. It does not appear at all by the declaration what that license was, or what relation it had to the subject matter of the agreement, but it cannot be contended, in my opinion, that the procurement of that license was a condition precedent to the performance of the agreement by the defendant. Supposing two parties agreed to make a voyage, and that one of them undertook to procure a license; if that license was one, without which the ship could not proceed on her journey, that must be shewn, and that it was necessary, therefore,

1841.

KEMBLE

v.
MILLS.

1841.

KEMBLE

v.
MILLS.

that the license should be procured. But the way of compelling the plaintiff to shew that would be by pleading non assumpsit, which puts in issue the agreement in the sense in which it is to be taken upon the allegations in the declaration. The defendant here has not taken this course, but he has put a plea on the record, which amounts to a circuitous way of denying the agreement made. This is non assumpsit in effect, but as there is no special demurrer to the plea on this ground, it cannot be taken advantage of, and I only throw out this as a suggestion arising upon the case. From the allegation of the plea, however, it does not at all appear that there was anything in the procurement of the license essential, in order that the defendant might, with propriety, pay the 5000*l*. It only alleges that the parties could not safely engage in, or carry on the business without it. That might be, and yet before either the engagement in the business, or the carrying it on, the defendant might be called upon probably to pay the 5000*l*. The words of the plea, however, are loose and popular expressions, and not such as should be used in pleading, and the judgment of the Court ought not to be framed upon terms and expressions, which in their nature are so popular, and indeed so rhetorical. It does not seem to me then, either that this is a condition precedent or concurrent, although upon the point of its concurrence no question at present arises. The fourth plea alleges the payment of the 2000*l*. by the plaintiff, as a condition precedent to the payment of the 5000*l*. by the defendant. Now, on looking at this agreement, it appears to me, that the payment of the plaintiff's 2000*l*., was not a thing either precedent to the payment of the defendant's money, nor does it appear to me that it was a condition concurrent, but that, if it were so, the allegation of the readiness and willingness of the plaintiff to perform his part of the stipulations is sufficient. When we look at the nature of the agreement, we find that the plaintiff is to procure 2000*l*. or "thereabouts," and if he does not do so, the business is to be carried on, and the residue is to be de-

ducted from his profits. In that case, therefore, it is neither a concurrent nor precedent condition; and I think that it is shewn that either a part or the whole of the amount may be paid or not, as the plaintiff thinks fit, or may be deducted from the profits. On these grounds, therefore, I think that the pleas are bad. With regard to the declaration: the second count is on a check on a banker, and I think that the excuse for the neglect or omission to give notice of dishonour is sufficient. It does not appear that the defendant had, in fact, any account at all at the bankers; and I think that when you have shewn that there are no assets at all in the hands of the bankers, that is an excuse sufficient to meet the objection here made, *Walwyn v. Quintin*(a). If there is anything to remove that excuse, it must come from the other side, and I do not think that the plaintiff is called upon to negative its possibility in his declaration. Judgment must, therefore, be for the plaintiff upon all the points.

1841.
KEMBLE
v.
MILLS.

Judgment for the Plaintiff.

(a) 1 Bos. & Pul. 652.

CLARK v. MORRELL and Others.

LUDLOW, Serjt., moved for a rule, calling upon the plaintiff in this action to shew cause why the verdict found at the trial should not be set aside, and a nonsuit entered, or a new trial had. The declaration alleged, that the plaintiff had agreed, "amongst other things," to undertake the management of certain vitriol works, belonging to the defendants, for five years, and that in consideration thereof, the defendants had undertaken to pay to the plaintiff the sum, &c. The cause was tried before Lord Abinger, C. B.,

The declaration stated an agreement, by which, "amongst other things" the plaintiff undertook to manage a factory for the defendants, in consideration whereof, the defendants promised to pay. The agreement,

when produced at the trial, was found to contain stipulations that the plaintiff would give his whole attention to the defendant's business, and would not convey his knowledge with regard to the intended business of the factory to any other person: *Held*, that there was no variance; but that if there was, the declaration was amendable under the 3 & 4 Wm. 4, c. 42, s. 23.

1841.
CLARK
v.
MORRELL
and Others.

at Guildford, and in support of the declaration, an agreement was put in, from which it appeared that the plaintiff had undertaken to assume the management of the defendants' works for five years; that he would manufacture oil of vitriol there, according to the best of his professional abilities; that he would give his exclusive attention to the said manufacture of oil of vitriol, and that he would not communicate the mode of manufacturing the said oil of vitriol to any other person; in consideration whereof, the defendants undertook to pay a certain sum of money to the plaintiff. It was objected, on the part of the defendants, that there was a variance between this agreement and the contract stated in the declaration, and that it was a case in which the learned judge had not the power to amend under the statute 3 & 4 Wm. 4, c. 42. Lord *Abinger*, however, held that there was a variance, but directed an amendment, and refused to postpone the trial. The jury found a verdict for the plaintiff, for 454*l.* 19*s.*, and the present motion was made pursuant to leave reserved. It was now contended, that all those terms which were omitted in the declaration, but which turned out to be material parts of the agreement, were part of the consideration, and ought to have been set out. It was not a case of the misstatement of the agreement, but of an omission of many of its material terms, and the statutes, (9 Geo. 4, c. 15 and 3 & 4 Wm. 4, c. 42) did not authorise an amendment in such a case, because they were not intended to relieve parties from the consequences of their own negligence. All the terms of the agreement formed the consideration for the defendants' promise, and the defendants had a right to shew that the plaintiff, by the non-performance of some of the terms of the agreement, had disentitled himself to that remuneration which he sought to obtain. The case of *Dashwood v. Peart* (a), shewed that every part of the consideration must be set out. The defendants, at all events, were entitled to the post-

(a) Cited in Roscoe's Evid. p. 60, from Manning's Index, p. 380.

ponement of the trial, in order that he might answer the new matter introduced, and the 23rd section of the 3 & 4 Wm. 4, c. 42, shewed that the rule for a new trial might be granted. *Masterman v. Judson* (b), was also cited.

1841.
CLARK
v.
MORRELL
and Others.

TINDAL, C. J.—It appears to me, that there are two questions to be considered in this case: first, whether the objection which was taken at the trial was a good one, and whether that which was brought before the learned judge amounted to a variance? And, secondly, supposing that there was a variance, whether the learned judge had authority, under the terms of the acts of Parliament, to make the amendment? On the first point, I must confess, that if the case had occurred before me, I should not have held that there was any variance. The declaration states an agreement, and then it states certain parts of it to have been entered into “amongst other things.” Then, having so stated it, it goes on to allege, that “in consideration thereof, the defendants promised, &c.” Now the consideration here, is the agreement to which reference has been made on the record, and that is to be found stated; and I do not see how it can be held to amount to a variance unless that part which is omitted is conditional, and is a part on which some allegation should be made in the declaration. I do not see that that is so, or that any part is omitted, which should be stated, in order to entitle the plaintiff to recover. It is said in the agreement, that the plaintiff would give his exclusive attention to the concerns of the defendants, and would not give his knowledge to any one else. If there was a cross action brought for the non-performance of these stipulations, it would not go to the root of the whole agreement, but it would form a small part only of the matter in dispute. Therefore, this does not seem to me to come within the principle of those cases, in

(a) 8 Bing. 234; 1 Moo. & Scott, 367, S. C.

1841.
 CLARK
 v.
 MORRELL
 and Others.

special demurrer, yet there was quite sufficient, in my opinion, to justify an amendment being made.

MAULE, J., concurred.

Rule refused.

FILMER v. BURNBY.

The plaintiff declared in assumpsit upon a parol agreement, to which the defendant pleaded the general issue: On the trial, it appeared that a draft had been prepared, containing matters intended by the parties to form the subject of a deed; that alterations were made in it by both parties, and that at length a deed was drawn up in accordance with the terms,

ASSUMPSIT. The declaration stated, that before the making of the promise of the defendant hereinafter mentioned, a certain action had been commenced and prosecuted, by and at the suit of the plaintiff, against the defendant, in the Court of our lady the Queen, before the Queen herself, for the recovery of a certain sum of money, to wit, the sum of 234*l.* 12*s.*, then, and at the time of the making of the promise of the defendant, hereinafter mentioned, due and owing from the defendant to the plaintiff, that is to say, the sum of 100*l.* parcel thereof, for goods sold and delivered by the plaintiff to the defendant, and the sum of 134*l.* 12*s.* residue thereof, for goods sold and delivered by the plaintiff to one Mary Anne Hammond, the wife of George Hammond, on the collateral guarantee of the defendant, and which said action, at the time of the making of the agreement, and executed: *Held*, first, that there was no subsisting parol agreement; and, secondly, that the deed, being co-extensive with the supposed agreement, the plaintiff had conceived his action in assumpsit erroneously, and should have brought covenant: *Held* also, that the defendant was entitled to set up the defence, that there was no parol agreement, under the plea of non assumpsit, although (per *Maule, J.*) had it been a case of merger of the agreement in the deed, that fact should have been specially pleaded.

The plaintiff declared upon an agreement, by which the defendant undertook to become answerable for certain sums of money, and give security for their payment, upon the stay of proceedings in an action against himself; and that proceedings were stayed by an order of a judge. The defendant pleaded, that the order of the judge directed a conditional stay of proceedings only; the plaintiff replied, taking issue upon the stay of proceedings: Evidence being given of the order of the judge, imposing a condition before the proceedings were stayed: *Held*, that the defendant was entitled to a verdict.

To a declaration in assumpsit for an attorney's costs in an action commenced by him against the defendant, the defendant pleaded that he was always ready and willing to pay a just and reasonable sum in satisfaction of the demand, and that before the commencement of the suit, he offered to pay such just and reasonable sum: It was proved that he had offered to pay the costs when the bill was taxed: *Held*, that such evidence did not support the plea, and that the plaintiff was entitled to a verdict.

1841.

FILMER

v.

BURNBY.

of the promise of the defendant, hereinafter mentioned, was depending in the said Court. That before and at the time, &c., the defendant was entitled, under and by virtue of an indenture of settlement, made on the marriage of the defendant with one Frances Faulconer, to the residue of certain moneys in the said indenture mentioned, and the defendant was then also, under and by virtue of the same settlement, interested in and entitled to other residue of certain other moneys, to be recovered on two several policies of assurance, then effected on the life of his said wife Frances, of all which said premises, defendant at the time, &c., had notice. And thereupon, heretofore, to wit, on the 23rd day of January, 1840, in consideration that the plaintiff, at the request of the defendant, would accept the security hereinafter mentioned, and would consent and agree not to take any further proceedings in the said action, the defendant then undertook and promised the plaintiff to secure the said sum of 100*l.*, and so much, if any, of the said sum of 134*l.* 12*s.* as should not have been recovered before the 16th November next, in an action which the plaintiff conditionally covenanted, at the request of the defendant, to commence against the said George Hammond, and also all costs and expenses which might be incurred in the said last mentioned action, with interest thereon, by an assignment of the respective residues, payable to the defendant, under or by virtue of the said indenture of settlement as aforesaid, and also to give the acceptance of him, the defendant, for the payment of the said debt of 234*l.* 12*s.*, payable on the said 16th November; subject to the aforesaid agreement as to the said sum of 134*l.* 12*s.*, together with interest thereon, and also to pay the costs as between attorney and client, then named in the said action so commenced and prosecuted by the plaintiff against the defendant as aforesaid; and also the costs of and relating to the said security, and other the costs of the plaintiff then incurred, or to be incurred by him, in relation to the premises. And the plaintiff avers, that he,

1841.
 CLARK
 v.
 MORRELL
 and Others.

special demurrer, yet there was quite sufficient, in my opinion, to justify an amendment being made.

MAULE, J., concurred.

Rule refused.

FILMER v. BURNBY.

The plaintiff declared in assumpsit upon a parol agreement, to which the defendant pleaded the general issue: On the trial, it appeared that a draft had been prepared, containing matters intended by the parties to form the subject of a deed; that alterations were made in it by both parties, and that at length a deed was drawn up in accordance with the terms,

ASSUMPSIT. The declaration stated, that before the making of the promise of the defendant hereinafter mentioned, a certain action had been commenced and prosecuted, by and at the suit of the plaintiff, against the defendant, in the Court of our lady the Queen, before the Queen herself, for the recovery of a certain sum of money, to wit, the sum of 234*l.* 12*s.*, then, and at the time of the making of the promise of the defendant, hereinafter mentioned, due and owing from the defendant to the plaintiff, that is to say, the sum of 100*l.* parcel thereof, for goods sold and delivered by the plaintiff to the defendant, and the sum of 134*l.* 12*s.* residue thereof, for goods sold and delivered by the plaintiff to one Mary Anne Hammond, the wife of George Hammond, on the collateral guarantee of the defendant, and which said action, at the time of the making

of the agreement, and executed: *Held*, first, that there was no subsisting parol agreement; and, secondly, that the deed, being co-extensive with the supposed agreement, the plaintiff had conceived his action in assumpsit erroneously, and should have brought covenant: *Held* also, that the defendant was entitled to set up the defence, that there was no parol agreement, under the plea of non assumpsit, although (per *Maule*, J.) had it been a case of merger of the agreement in the deed, that fact should have been specially pleaded.

The plaintiff declared upon an agreement, by which the defendant undertook to become answerable for certain sums of money, and give security for their payment, upon the stay of proceedings in an action against himself; and that proceedings were stayed by an order of a judge. The defendant pleaded, that the order of the judge directed a conditional stay of proceedings only; the plaintiff replied, taking issue upon the stay of proceedings: Evidence being given of the order of the judge, imposing a condition before the proceedings were stayed: *Held*, that the defendant was entitled to a verdict.

To a declaration in assumpsit for an attorney's costs in an action commenced by him against the defendant, the defendant pleaded that he was always ready and willing to pay a just and reasonable sum in satisfaction of the demand, and that before the commencement of the suit, he offered to pay such just and reasonable sum: It was proved that he had offered to pay the costs when the bill was taxed: *Held*, that such evidence did not support the plea, and that the plaintiff was entitled to a verdict.

1841.

FILMER
v.
BURNBY.

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1841.

FILMER

v.

BURNBY.

confiding in the said promise and undertaking of the defendant, did then consent and agree to accept the said security, and not to take any further proceedings in the said last-mentioned action; and thereupon, afterwards, to wit, on the 23rd January, 1840, by a certain order of the Right Hon. Mr. Justice *Williams*, then made by consent in the said last-mentioned action, it was ordered that all further proceedings in the said last-mentioned action should be, and the same then were, and from thence hitherto have been, and still are, stayed; and the plaintiff, in fact, further saith, that although the defendant, in part performance of his said promise and undertaking, did afterwards, to wit, on the 22nd January, 1840, aforesaid, seal and deliver to the plaintiff, and the plaintiff then accepted as such security as aforesaid, a certain indenture of assignment of the said respective residues, payable to the defendant, as aforesaid; and although the defendant did also then accept and deliver to the plaintiff a bill of exchange, drawn by the plaintiff upon the defendant, for the said sum of 234*l*. 12*s.*, payable on the said 16th November, with interest thereon, nevertheless the plaintiff, in fact, further saith, that although the costs, as between attorney and client, then incurred in the said action, so stayed as aforesaid, together with the costs of and relating to the said security, amounted to a large sum, to wit, the sum of 55*l*. 1*s.* 8*d.*, and although the costs of the plaintiff then and since incurred by him in relation to the premises, amount to another large sum of money, to wit, the sum of 20*l.*, whereof the defendant afterwards, &c., had notice, yet the defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the plaintiff in this behalf, hath not, although often requested so to do, paid the said costs, as between attorney and client, then incurred in the said last-mentioned action, or the costs of and relating to the said security, or the said other costs of the plaintiff, incurred by him in relation to the premises, or any or either of them, or any part thereof, but on the contrary thereof,

1841.

FILMER
v.
BURNBY.

hath wholly omitted and refused, and still doth omit and refuse to pay the same; by reason whereof the plaintiff heretofore, to wit, on the 7th March, 1840, was forced and obliged, and did necessarily and unavoidably pay to J. B. Wathen, then being the attorney of him the plaintiff, in and about the premises, a large sum of money, to wit, the sum of 55*l.* 1*s.* 8*d.* being the amount of the said costs between attorney and client, incurred in the said action so stayed as aforesaid, together with the costs of and relating to the said security; and he, the plaintiff, hath also become liable to pay to the said J. B. Wathen, as such attorney as aforesaid, another large sum of money, to wit, the 20*l.*, as and for the costs of the plaintiff, then and since incurred by him in relation to the premises; by means whereof the plaintiff hath, for a long space of time, to wit, from thence hitherto, been deprived of the use, benefit, and advantage of the said sum of 55*l.* 1*s.* 8*d.*, and of divers great gains and profits which he might and otherwise would have obtained from the use of the same, and is by means of the premises, otherwise greatly injured and damnified, to the damage of the plaintiff of 300*l.*

Pleas, first, non assumpsit.

Secondly, that the further proceedings in the said action so commenced and prosecuted by the plaintiff against the defendant, as in the declaration mentioned, have not been, nor are they stayed according to the plaintiff's agreement in that behalf, but on the contrary thereof, the said action is still depending and not discontinued or stayed, and it is, by the said order of the said Right Hon. Mr. Justice *Williams*, in the declaration mentioned, bearing date the 23rd January, 1840, ordered, that upon payment of 234*l.* 10*s.* the debt for which that action was brought, together with interest thereon, on the 16th November then next, all further proceedings should be stayed; and it is thereby further ordered, that unless the said debt and interest be paid as aforesaid, the plaintiff is to be at liberty to sign final judgment, and issue execution for the amount, with costs of

1841.

FILMER

v.

BURNBY.

judgment, execution, officers' fees, sheriff's poundage, and all incidental expenses. Verification.

Thirdly, as far as relates to the non-payment of the said costs, as between attorney and client, incurred in the said action, commenced and prosecuted by the plaintiff against the defendant, as in the declaration mentioned, and the costs of and relating to the said security, the defendant says, that the plaintiff ought not to maintain his action against the defendant because he was always, from the time of the making his said promise, and still is ready and willing to pay a just and reasonable sum in satisfaction and discharge of those costs respectively, whereof the said J. B. Wathen, &c., had notice; and afterwards, and before the commencement of this suit, to wit, on the 1st of March, 1840, he, the said defendant, proposed and offered to the said J. B. Wathen, to pay him such just and reasonable sum in satisfaction and discharge of such costs respectively, but the said J. B. Wathen then refused to accept the sum so offered, and demanded of the defendant for the said costs, an exorbitant sum, and more than was justly due and of right payable to him in respect of the said costs. Verification.

The replication joined issue upon the first plea. To the second plea, the plaintiff replied, that he, by reason of anything by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because he, the plaintiff, at the time of the making of the said promise of the defendant, did, as in the declaration alleged, consent and agree not to take any further proceedings in the said action, and did then and until and at the time the plaintiff so accepted the said security as aforesaid cease, and hath from thence hitherto ceased to prosecute the same and all further proceedings thereon were, at the time the plaintiff so accepted the said security as aforesaid, and from thence hitherto have been stayed according to the plaintiff's said agreement in that behalf. To the third plea, so far as related to the non-

payment of the costs, as between attorney and client, incurred in the action commenced and prosecuted, by the plaintiff against the defendant, as in the declaration mentioned, and the costs of and relating to the said security, the plaintiff replied, that he, the plaintiff, by reason of anything by the defendant in that alleged, ought not to be barred from maintaining his aforesaid action thereof against the defendant, because, he saith, that the defendant did not offer to the said J. B. Wathen a just and reasonable sum in satisfaction and discharge of such costs respectively, in manner and form as the defendant hath alleged.

1841.
 FILMER
 v.
 BURNBY.

Issue was joined on the replications to the second and third pleas, and the cause went down to trial before *Maule, J.*, at the sittings after Hilary Term, 1840. In support of the declaration, evidence was then given with a view to shew that a parol agreement existed between the plaintiff and the defendant. It was proved that a draft of the agreement was prepared, and was submitted to the parties for approval; that this document passed several times from one to the other, various alterations being made in it, but at length it was admitted by both to contain all those terms which might be agreed upon, and on the 22nd January, 1840, the deed was executed in accordance with its terms (a). Upon this evidence it was contended, on the

(a) The following is a copy of the deed: "This indenture made the 22nd day of January, 1840, between William Burnby, of Euston Square, in the county of Middlesex, Esq., of the one part, and Thomas Henry Filmer, of Berners Street, Oxford Street, in the same county, Cabinet Maker and Upholsterer, of the other part; Whereas, by indenture, bearing date on or about the 4th of April, 1838, and made between the said Wm. Burnby, of the first part, Frances Faulconer, of New

Haven, in the county of Sussex, spinster, of the second part, and William John Whyte, of Vernon Place, Bloomsbury Square, in the county of Middlesex, gent., and Robert Southee, of Ely Place, in the same county, gent., of the third part, (being the settlement made in contemplation of a marriage then intended, and which was shortly afterwards duly solemnized between the said W. Burnby and Frances Faulconer, and which said Frances Faulconer was, at the date of the said

1841.

FILMER

v.

BURNBY.

part of the plaintiff, that a parol agreement existed between the parties, upon which the plaintiff was entitled to sue,

settlement, an infant, under the age of twenty-one years,) all and singular, the part or share, or parts or shares of the real and personal estate of Thomas Chippen Faulconer, the then late father of the said Frances Faulconer, to which the said Frances Faulconer was then, or would, on her attaining the age of twenty-one years, or at any time thereafter, become entitled, under or by virtue of the therein recited will of the said Thomas Chippen Faulconer, and also, &c., were assigned unto the said William John White, and Robert Southee, their executors, &c., upon trust, to call in and receive payment of the said part or share, &c., and raise, appropriate, and set apart, out of the said part or share, &c., the sum of 8000*l.* sterling, to be held by the said trustees, upon the trusts hereinafter declared, concerning the same, and to pay and transfer the residue of the said monies, &c., remaining, after satisfying the said sum of 8000*l.* unto the said Wm. Burnby, his executors, &c., for his, and their own absolute use and benefit, and by the said now reciting indenture, the said Wm. Burnby, did covenant and agree with the said William John Whyte, and the said Robert Southee, that he, the said William Burnby, his heirs, &c., would, at his and their costs and charges, within forty days after the solemnization of the said then intended marriage, effect a policy or policies of assurance, in the

name or names of the said William John Whyte and Robert Southee, or the survivor of them, their executors, &c., in the life of the said Frances Faulconer, for the sum of 10,000*l.*, and would pay the annual or other premium, or sum of money, which should be necessary for keeping the said policy or policies on foot, until the said Frances Faulconer should attain the age of twenty-one years, or die under that age; and it was thereby agreed and declared that if the said Frances Faulconer should die under the age of twenty-one years, the said trustees should receive the monies to be recovered under such policy or policies of assurance, and thereupon or thereout to deduct or retain the sum of 3000*l.* to be held by them, upon the trusts therein mentioned or referred to, and should pay the residue of such monies unto the said Wm. Burnby, his executors, &c.; and whereas, since the solemnization of the said marriage between the said Wm. Burnby and Frances Faulconer, (now Frances Burnby), the part or share of the estate of the said Thomas Chippen Faulconer, Esq., deceased, to which the said Frances Burnby will, on her attaining the age of twenty-one years, become entitled, &c., has been ascertained and appropriated by the trustees of the said will, and has, by them, been laid out and invested in the purchase of 8709*l.* 15*s.* 10*d.*, 3¼ per cent. consols, which sum is now stand-

and that the defendant could not take advantage of an objection that there was no such parol contract, but a spe-

1841.

FILMER

v.

BURNBY.

ing in the names of Thomas Martin Wood, &c., and others, the present trustees of the said will, in the books of the Governor and Company of the Bank of England; and whereas, subsequently to the said marriage, the said William Burnby did, in pursuance of the said covenant and agreement, in that behalf contained in the said hereinbefore recited indenture of settlement, effect two certain policies of assurance in the North British Insurance Office, and the Pelican Insurance Office, &c., on the life of the said Frances Burnby, each of which said policies is for the sum of 5000*l.*, &c.; and whereas the said Frances Burnby will, if then living, attain her age of twenty-one years, on the 16th day of September now next ensuing; and whereas the said W. Burnby now stands justly and truly indebted to the said Thomas Henry Filmer, in the sum of 234*l.* 12*s.*, videlicet, in the sum of 100*l.* for goods sold and delivered by the said Thomas Henry Filmer to him, the said William Burnby, and in the further sum of 134*l.* 12*s.* for goods sold and delivered by the said Thomas Henry Filmer to one Mary Ann Hammond, the wife of G. Hammond, of Stone House, near Canterbury, in the county of Kent, on the collateral guarantee of the said W. Burnby as he the said W. Burnby doth hereby admit and acknowledge. And whereas the said Thomas H. Filmer did on or about

the 3rd day of December now last, commenced an action in the Court of Queen's Bench at Westminster, against the said W. Burnby for the recovery of the said sum of 234*l.* 12*s.*, and which said action is still pending; and whereas in order to prevent further proceedings in the said action and the increase of costs consequent thereon, the said W. Burnby hath proposed to secure the said sum of 100*l.* so due in respect of goods sold and delivered to him the said W. Burnby as aforesaid; and also so much if any of the said sum of 134*l.* 12*s.* so due in respect of goods sold and delivered to the said Mary Ann Hammond, as shall not have been recovered on or before the 16th day of November next, in an action which the said T. H. Filmer has conditionally covenanted at the request of the said W. Burnby to commence against the said George Hammond for the recovery of such last mentioned sum, and also all costs and expenses which may be incurred and sustained or paid by the said T. H. Filmer in such last mentioned action, together with interest on such sums, costs, and expenses respectively at the rate of five per cent. per annum, by an assignment of the said respective residues payable to him, the said W. Burnby, under or by virtue of the said recited indenture of settlement as aforesaid, of the hereinbefore mentioned sum of 8709*l.* 15*s.* 10*d.* 3¼ per cent.

1841.

FILMER

v.

BURNBY.

cialty only, under a plea of non assumpsit. It was eventually agreed that the learned judge should direct the jury to find

consols, and of the monies to be recovered under the hereinafter mentioned policies of assurance on the life of the said Frances Burnby remaining after deducting or satisfying the said sum of 8000*l.* mentioned in the same indenture of settlement; and also to give the acceptance of him the said W. Burnby, for the whole amount of the said debt, or sum of 234*l.* 12*s.* payable on the said 16th November next, subject to the aforesaid agreement as to the said sum of 124*l.* 12*s.*, together with interest thereon in the meantime at the rate aforesaid, and also to pay the costs as between attorney and client already incurred in the said action. And also the costs of and relating to this present security, and other the costs of the said T. H. Filmer incurred or to be incurred by him in relation to the premises, and to which the said T. H. Filmer hath consented and agreed, and hath accordingly agreed not to take any further proceedings in the said action: And whereas in part pursuance of the said recited proposal and agreement, the said W. Burnby hath accepted and delivered to the said T. H. Filmer a bill of exchange drawn upon him, the said W. Burnby, by the said T. H. Filmer, for the said sum of 234*l.* 12*s.* which said bill of exchange bears even date with these presents, and is payable on the said 16th day of November, together with interest thereon, to be computed from the date

thereof at the rate of five per cent. per annum. Now this indenture witnesseth, that in further pursuance of the said recited proposal and agreement, and in consideration of the premises, and also in consideration of five shillings of lawful money of Great Britain by the said T. H. Filmer paid to the said W. Burnby at or immediately beyond the sealing and delivery of these presents, the receipt whereof is hereby acknowledged that he, the said W. Burnby, hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, &c. unto the said T. H. Filmer, his executors, &c., all that the residue payable to him, the said W. Burnby, under and by virtue of the said recited indenture of settlement, &c., henceforth absolutely, subject nevertheless to the trusts hereinafter declared concerning the same, and to the proviso next hereinafter contained, that is to say, provided always, and it is hereby agreed and declared that the said T. H. Filmer, his executors, &c., do and shall stand and be possessed of and interested in as well all monies which may come to his or their hands, or be received by him or them under or by virtue of these presents, as also all monies, if any, which may be recovered and received by him, the said T. H. Filmer, his executors, &c., in the said action, to be brought against the said George Hammond as

according to his view of the case, and he directed a verdict for the defendant, upon the ground that there was no parol agreement.

1841.

FILMER

v.
BURNBY.

aforesaid (after paying and satisfying thereout all the extra and other costs by him, &c. in and about such action) upon trust, in the first place to take up and pay the said bill of exchange, when the same shall become due and payable, and to retain and pay thereout to and for himself and themselves respectively, all other, if any the principal and interest moneys hereby intended to be secured, which shall then be due and owing to the said T. H. Filmer, his executors, &c., and all costs, charges, and expenses attending the recovering and obtaining payment of such moneys, and the execution of the trusts and powers hereby created, and pay and assign the residue or surplus, if any, of the said moneys, after such payments and deductions as aforesaid, unto the said W. Burnby, his executors, &c.; And it is hereby declared that the receipt or release of the said T. H. Filmer, his executors, &c., for any sum or sums of money to be received by him or them in the execution of the trusts hereinbefore contained shall effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof: And the said W. Burnby doth hereby for himself, his heirs, &c. covenant and declare and agree to and with the said T. H. Filmer, his executors, &c. in manner following, that is to say, that the

said policies of assurance, &c. are now valid and subsisting policies, and that he, the said W. Burnby, hath not at any time heretofore made, done, or executed, or knowingly suffered, or been privy to, or omitted any act, matter, or thing whatsoever, whereby the said residues, moneys, or premises hereby assigned, or any part thereof are assigned, impeached, charged, or in anywise encumbered, or whereby the said T. H. Filmer, his executors, &c., may be in anywise hindered or prevented from recovering or receiving the same residues, &c., or any part thereof, save and except a certain charge or security given by the said W. Burnby, to one William Chaplin, &c.; And also that he, the said W. Burnby, or any other person or persons by his order or for his use, shall not nor will at any time hereafter make, do, commit, or suffer any act, matter, or thing whatsoever, whereby the said residues, &c., shall or may be released or otherwise discharged, unless with the consent in writing of the said T. H. Filmer, his executors, &c.; but shall and will in case of default being made in payment of the said principal and interest intended to be hereby secured or any part thereof, at the time and in manner hereinbefore provided for payment thereof, permit and suffer the said Thomas Henry Filmer, his executors, &c., peaceably and quietly

1841.

FILMER
v.
BURNBY.

Upon the second issue a question arose, whether it was necessary that a stay of proceedings should be shewn to have taken place. For the plaintiff it was contended, that the substantial issue was the making of the agreement, while on behalf of the defendant, it was urged, that the plaintiff, by his replication, had put in issue the stay of proceedings, and that that issue not being affirmatively supported by the plaintiff, he was entitled to a verdict. Upon this point, *Maule*, J., also directed a verdict for the defendant.

Upon the third issue, the evidence adduced on behalf of

to recover all the said residues &c., and every part thereof; and moreover that he, the said Wm. Burnby, his executors, &c., shall and will, until the said Frances Burnby shall attain the age of twenty-one years, pay the premiums or other monies requisite for keeping on foot the said hereinbefore mentioned policies of assurance; and also shall and will from time to time, and at all times after such default as last aforesaid, in payment of the said principal and interest moneys intended to be hereby secured, or any part thereof, upon the request of the said Thomas Henry Filmer, his executors, &c., but at the expense of him the said Wm. Burnby, his executors, &c., make, do, and execute, or cause to be made, &c., all and every such further and other acts, deeds, matters, and things, assignments and assurances whatsoever, for the better and more effectually assigning and assuring the said residues, &c., unto the said Thomas Henry Filmer, his executors, &c., freed and discharged of and from the pro-

viso for redemption hereinbefore contained, and all equity, by virtue thereof, as by the said Thomas Henry Filmer, his executors, &c., shall be advised or required: And the said Thomas Henry Filmer doth hereby for himself, &c., covenant, promise, and agree with, and to the said Wm. Burnby, his executors, &c., that he, the said Thomas Henry Filmer, shall and will, from time to time, upon being furnished with sufficient moneys for that purpose commence an action in one of her Majesty's Courts at Westminster, against the said George Hammond forthwith, or as soon as conveniently may be, after the execution of these presents for the recovery of the amount in value of the said goods sold and delivered to the said Mary Ann Hammond, as aforesaid, and shall and will duly prosecute such action; Provided always, and it is hereby lastly agreed and declared that the principal moneys to be ultimately recoverable by virtue of this security, shall not exceed the sum of 500*l.*, in witness whereof, &c.

the defendant was, that the defendant's attorney had met the plaintiff's attorney, and that the latter having demanded payment of the costs, the former had offered to pay him whatever should be found due, upon taxation. The plaintiff objected that the allegation of the defendant being ready and willing to pay a reasonable sum was not supported by this evidence, but a verdict was entered for the defendant.

1841.
 FILMER
 v.
 BURNBY.

Bompas, Serjt., subsequently moved for a rule, calling on the defendant to shew cause why a verdict should not be entered for the plaintiff, with such damages as the Court should direct, or why there should not be judgment entered for the plaintiff non obstante veredicto, on the second issue.

Ludlow and *Channell*, Serjts., and *Swann*, now shewed cause. First, there was no agreement existing before the execution of the deed, on which the plaintiff could sue; and that being the case, the defendant was entitled, under the plea of non-assumpsit, to shew that he had never entered into the agreement alleged. 2 *Stark. Evid.* p. 77; *Gilb. Evid.* 183 (a). He did not rely, it was to be observed, upon a merger of the agreement in the covenant by deed, but by that plea, he denied that the parol agreement had ever been entered into, and that there was any such binding contract between the parties as was alleged by the declaration. That there was no parol agreement was obvious, because the comparison of the deed with the declaration distinctly shewed that the former only carried into effect the terms alleged in the latter to have formed the subject of an agreement, and which, until the deed was executed, were not binding upon the parties. The two were, in fact, co-extensive; and such being the case, the plaintiff had brought his action in a wrong form; in assumpsit, instead of in covenant. The jury had found that the agreement and

(a) Vide, *Neale v. M'Kenzie*, 2 C., M. & R. 67.

1841.

FILMER

v.
BURNBY.

the deed were co-extensive, and the verdict was rightly entered for the defendant. Upon the second issue it was obvious that the plaintiff had not, in fact, stayed the proceedings in the cause which was pending. The issue was simply whether proceedings had been stayed. The order, upon which the affirmative was sought to be proved, was not a positive, but a conditional stay of proceedings only, and the jury had rightly found that issue for the defendant. *Ball v. Stanley* (a). Upon the third issue, the defendant was also entitled to retain his verdict. The effect of the proof which was given was, that the defendant offered to pay the bill, if it was taxed. It was the right of every person to have an attorney's bill taxed which was delivered to him, and the defendant had here only clothed his offer with a term which he was entitled to impose, and the offer was, therefore, one which was sufficient, and the plea was sufficiently proved. *Sadler v. Palfreyman and Others* (b).

Bompas, Serjt., and Hurlstone, for the plaintiff. There was a sufficient agreement upon the draft to entitle the plaintiff to sue upon it, and to recover in this action. The draft which was prepared, afforded clear and distinct evidence by parol of that which afterwards existed by deed. The deed itself contained the words "hath agreed," and also recited a pre-existing agreement, and the general effect of its terms shewed that there was a contract already in existence. But supposing it to be a contract by deed, it was the duty of the defendant to plead that the agreement was void for that reason, and that there was no subject matter for an action of assumpsit. *Weston v. Foster* (c) was a case strongly in point, and shewed, that if a simple contract debt be merged in a specialty subsequently given, it must be pleaded specially. The second plea afforded no answer to the action. The issue raised was a simple one, whether proceedings had been stayed, and the fact of

(a) *Ante*, vol. 8, p. 344.

& Man. 598.

(b) 1 Ad. & Ell. 717; 3 Nev.

(c) 2 Bing. N C. 693; 3 Scott, 155.

1841.

FILMER

v.
BURNBY.

more being alleged in the plea than was necessary to be disproved, would not entitle the defendant to a verdict if it was not disproved. There was no denial of the agreement, but the allegation of the defendant rested only on the effect of the order of Mr. Justice *Williams*. The allegation that the proceedings were not stayed was no answer to the action; it was not a condition precedent, although it might be admitted that the non-performance of the agreement would afford the defendant a ground of action against the plaintiff. *Mapes v. Sydney* (a), *Cook v. Douse* (b), *Jervis v. Sydney* (c). Upon the third issue, the plaintiff was clearly entitled to a verdict. The tender proved was that of the attorney to pay the costs upon their being taxed. Such proof, however, would not support the allegation of tender. Such an allegation could only be supported by proof of a personal offer by the defendant to pay, the offer being clogged by no condition.

TINDAL, C. J.—I am of opinion, that with respect to the first issue, the verdict which has been entered for the defendant should not be disturbed. The question is, whether the plaintiff had any right to sue upon a parol contract in this case, upon the evidence which was adduced upon the trial. On the part of the defendant, it was alleged, that there was no distinct parol contract, upon which the action could be maintained, but that there was an existing covenant under seal, which would give the plaintiff a remedy for all the subject matter of the action. That involves two inquiries: first, whether there was a covenant co-extensive with the agreement; and, secondly, whether there was a parol contract existing before that covenant, of which the plaintiff could avail himself. Now, it appears to me, that there is an existing covenant which is co-extensive with the claim of the plaintiff. The action is brought on a promise, by which the defendant is said to agree to give a

(a) Cro. Jac. 683.

(c) 3 Dowl. & Ry. 483.

(b) Cro. Car. 341.

1841.

FILMER

v.

BURNBY.

certain security, and also to pay the costs in two actions, namely, in an action which the plaintiff had brought against the defendant, and the stay of proceedings, in which was the ground of the promise; and also to pay the costs in an action which might eventually be brought by the plaintiff against Mr. Hammond, in which case, if the plaintiff incurred any expense by the verdict being against him, the defendant not only undertook to pay those costs, but interest upon them. The breach laid in the declaration is, that neither of these two classes of costs was paid; that is, neither in the original action which was brought by the plaintiff against the defendant, and in which the plaintiff says that he agreed to stay all proceedings, and in which all proceedings had been stayed, nor in the other action which might be brought. Let, us see, therefore, whether there is in this deed any covenant by which the party might receive both these classes of costs, for if there is not, the contention of the defendant is rendered groundless. The deed begins with a recital of a contract entered into preparatory to the making of the deed, and that contract, among other things, recites an agreement with respect to the costs of both actions. Then it goes on to give security for the subject matter of the first action, by pledging certain stock in which the plaintiff had an interest; and also making a proviso, that when all is done which is required by the deed, the pledge shall be redeemed; and then there is a covenant to do certain things which are contracted between the parties. The whole question which arises is, whether, on comparing together the recital in the deed, the proviso, and the covenant, we can perceive that both classes of costs now sought to be recovered, are secured by the covenant? The covenant is in these terms: "Whereas in order to prevent further proceedings in the said action, (that against the defendant) and the increase of costs consequent thereon, the said W. Burnby hath proposed to secure the said sum of 100*l.*, &c., as aforesaid, and also so much, if any, of the said sum of 134*l.* 12*s.* so due, in respect of goods sold and de-

1841.

FILMER

v.

BURNBY.

livered to the said M. A. Hammond, as shall not have been recovered on or before the 16th November next, in an action which the said T. H. Filmer has conditionally covenanted, at the request of the said W. Burnby, to commence against the said G. Hammond, for the recovery of such last-mentioned sum, and also all costs and expenses which may be incurred and sustained or paid by the said T. H. Filmer, in such last-mentioned action, together with interest on such sums, costs, and expenses respectively, &c.” What is the “last-mentioned?” There is no other mentioned but the action between Filmer and Hammond, and if the covenant had contained nothing further, there would have been no remedy for costs relating to the original action. But it goes on to provide for the security, by an assignment of the respective residues payable under the marriage settlement, and by giving an acceptance for the whole amount of the debt or sum of 234*l*. 12*s.*, subject to the aforesaid agreement as to the sum of 124*l*. 12*s.*, together with interest thereon, and “also to pay the costs as between attorney and client already incurred in the said action, and also the costs of and relating to this present security, and other the costs of the said T. H. Filmer, incurred or to be incurred by him in relation to the premises.” It appears to me, that these latter words let you into a consideration of the whole of the deed, and do not confine the agreement contained in the covenant only to the proviso, and that if you allege a defence to the whole deed, you allege it to the recital. What is the recital? That the security shall extend as well to the costs of the agreement as to the other costs; and it seems unreasonable to say, that where they bonâ fide entered into the covenant that security should be given for costs, the covenant should only extend to the costs in an action which might never be brought at all, and should not extend to the costs of an action then pending. Looking, therefore, at the deed, I think that the covenant does comprehend the costs sought to be recovered in this action, and, therefore, that this action should not have been

1841.

FILMER
v.
BURNBY.

brought upon the parol contract, but upon the contract under seal. Still, however, there is an objection which remains to be considered. Was there, before this contract was entered into, a parol agreement on which the plaintiff could have declared, because if there was, by all the rules of pleading, the defendant could not avail himself of this answer under non assumpsit, but should have confessed and avoided it. But I cannot say, on the evidence referred to, on the recital in the deed, and on my Brother *Maule's* notes, that there was such a distinct agreement, because it seems to me, that all was in fieri, in a state of mere preparation, and that both sides were employed in framing an agreement, which was to be effected by a contract under seal. The evidence which is reported to us is, that the draft was going back and forwards, alterations were made in it from time to time by both parties up to the moment of the execution of the deed, and it is impossible to say that there was any distinct substantive agreement except that upon the deed itself. But my Brother *Bompas* says, that the defendant should have pleaded this in answer to the action, and that he could not avail himself of it, under non assumpsit, and he refers to one of the examples given in the rule of Court of H. T., 4 Wm. 4, s. 3(a): "In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded, &c." But it is to be observed, that in this case, the plea does not admit the cause of action as laid in the declaration, but the contention is, that there was no such parol promise separate from the deed. The very form of non assumpsit says in effect, that there is no such contract as that declared on, and that is the main and important question between the parties. Upon the second plea, it appears to me also, that the verdict should remain

(a) *Ante*, vol. 2, p. 322.

as it now stands. This is a matter of very little consequence, because it involves no more than the costs of the plea itself, for, it seems to me that the substantive part of the issue is, that the proceedings have not actually been stayed, but continue up to this time; and the words of the replication are sufficiently large to include that, so that the parties go to issue, whether there has been a stay of proceedings or not. As to the third plea, I think that the verdict should be entered for the plaintiff, because it seems to me, that the allegation, that the defendant had offered to pay a reasonable and proper sum for costs, is not made out by proof of an offer, that when the bill was taxed he would pay the costs.

1841.

FILMER

v.

BURNBY.

BOSANQUET, J.—The material question in this case arises upon the plea of non assumpsit, and that depends upon the question of whether there is a simple contract between the parties, or whether in truth the demand is founded on a specialty. At the trial, it was agreed that my Brother *Mauls* should direct the jury upon the facts of the case, and it appeared to him that there was no simple contract proved, and he ordered the verdict to be entered for the defendant, upon the plea of non assumpsit. But the case has been argued upon the ground that that was not a proper view to take of it, looking at the drafts which had been prepared before the execution of the deed, and at the deed itself. First, it was argued that there was a parol agreement between the parties, before the execution of the deed. I think the result of the new rules is, that if a simple contract once existed, and the defendant desired to get rid of it by shewing that it had been put an end to, it lies on him to put it on the record by his plea. The question is, here, whether there ever was any such simple contract? First of all it is said, that the drafts which were prepared amounted to an agreement between the parties. Generally, where a negotiation takes place with a view to certain matters being carried into effect by a deed, and drafts are prepared,

1841.

FILMER

v.

BURNBY.

subject to the approbation of both parties, and the deed is carried into effect, there is no simple contract between the parties, the deed being that which was contemplated by them. It is clear that the draft in this case was merely preparatory to the deed, and the circumstances of its having been prepared, it seems to me, cannot be relied on as constituting a simple contract between the parties. But then it is said, that there is that recited in the deed which may be evidence of a precedent contract, and which, if not carried into execution by the deed, may be declared upon. The question on that will be, whether or not security has been given by the deed for that which is the subject of the action, and it appears to me that there has. First of all, the recital extends to that which is the subject of the present action. It states the whole of the arrangement between the parties, and it includes both sets of costs, both the costs of the action between the plaintiff and the defendant, and those of the action between the plaintiff and Mr. Hammond. The recital stood alone, and it was said that that was evidence of an existing prior contract. The ground on which I am disposed to put the case is, that all the matter contained in it is carried into effect by the subsequent part of the deed. The proviso states various things, the performance of which is the condition of the security which is given; and amongst other things, there are mentioned the costs of suit against Mr. Hammond, and the interest thereon, and it is admitted that the proviso does not itself contemplate the costs which are the subject of the action. The recital does contemplate them then, and the proviso does not, but then there is the covenant, which is not confined merely to the proviso, but which, according to my construction of it, extends to the payment of all that which appears by the deed to be agreed to be paid between the parties. Therefore, it appears that the covenant is a covenant by specialty, by which it is agreed that the subject of this action should be secured, and that no action on simple contract will lie. My opinion is founded upon the ground

that the supposed agreement had only matter in contemplation, which was to be carried into effect by deed, and the deed having carried it into effect, that is the contract, and the only contract between the parties. With respect to the second issue, that is matter of comparatively small consequence, because, if the plaintiff cannot have judgment to recover anything on the declaration, the effect of the finding on this issue is not very material. But I think that the true intent and meaning of the arrangement between the parties was, that these proceedings should be stayed, and that on these pleadings, that which is affirmed on one side and denied on the other is, that the proceedings were stayed; and if they have not been stayed, the verdict is rightly entered for the defendant on that issue. Then it is said that there should be judgment for the plaintiff non obstante veredicto. Now, if the real meaning of the contract is such as I suppose, it does not appear to me that there is any ground for that objection, and the judgment would be perfectly ineffective, because, as upon non assumpsit the plaintiff cannot recover anything, the judgment would not give him anything. I think that the judgment, therefore, should be entered on this plea consistently with the verdict. Upon the third issue, I agree with my Lord Chief Justice in the opinion which he has expressed, that the issue should be entered for the plaintiff.

MAULE, J.—I also think that the issues in this case should be disposed of in the manner stated by the Lord Chief Justice. With respect to the first contention, that there was evidence on the subject of a parol agreement antecedent to the deed, it seems to me that there was some evidence upon that subject, yet that in fact there was no agreement otherwise than appears on the face of the indenture. Although the recital of the indenture is evidence of a prior agreement, yet the other evidence negatived its existence. The parties were going on negotiating, and a draft was prepared, but the only agreement which

1841.

FILMER

v.
BURNBY.

1841.

FILMER

v.

BURNBY.

existed was that with respect to what the deed should be, and there was no agreement to do the things subsequently covenanted by the deed to be done. I think, therefore, it must be taken that there was no actual agreement in existence before the deed, and that the intention of the parties was, that what was to bind them should be a deed and nothing else, and that they did bind themselves by a deed, and that assumpsit, therefore, cannot be maintained. Then it is said that this should be pleaded. I agree that it should, if there was a prior agreement which was merged in the deed. The meaning of the declaration in assumpsit is, that there was a parol promise, which is a promise not under seal, and the plea of non assumpsit denies the existence of such a promise, and the declaration cannot be proved by showing a promise under seal. I think, therefore, the issue was properly found for the defendant. That really disposes of all the substantial parts of this case, but I think also that the second issue was rightly found for the defendant. Looking at the declaration, I agree that it was immaterial that the plaintiff should shew the stay of proceedings, but then the defendant has denied that they were stayed, and the plaintiff has affirmed that fact, and the issue is, whether they were stayed or not. There is no doubt that the proceedings were not stayed, and that being the issue, the defendant has proved that he is right. As to the question of judgment non obstante veredicto, I say nothing, because I do not think that it arises. Upon the third issue, there is some doubt, but upon the whole, I think that an offer to pay what shall be found to be due on taxation, does not necessarily support an allegation of an offer to pay a reasonable sum, because the offer makes the taxation of costs a condition precedent, and it might be consistent with the allegation that the opposite party was ready to make any deduction which was reasonable, but that the defendant insisted upon a taxation taking place.

Rule accordingly.

COURT OF QUEEN'S BENCH.

Easter Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

HOLMES v. RUSSEL.

1841.

THESIGER moved, on the third day of the Term, for a rule to shew cause why the proceedings in this case should not be set aside for irregularity. The present was an action on a bill of exchange for the amount of 30*l.* against the defendant, as the accommodation acceptor of that bill. The bill was accepted for the accommodation of a person named Law, who indorsed it to a person named Siggers, who indorsed it to the plaintiff. The day at which the bill became due arrived and passed, and the defendant presumed it had been paid by Law. A considerable time elapsed, and nothing was heard of the bill. On the 15th February, a levy was made on the goods of the defendant for the amount of the bill, with costs, poundage, and other charges, forming in the whole a sum of 45*l.* It was sworn by the defendant, that no process or any proceedings in the cause had been served upon him, nor had any come to his knowledge, until the levy was made by the sheriff. The proceeding of the plaintiff, was, therefore, clearly irregular, and ought to be set aside.

Where a levy was made on the goods of the accommodation acceptor of a bill of exchange on the 15th of February, it was held too late to apply on the third day of the following Easter Term, to set aside those proceedings on the ground of no process having been served on the defendant, as the plaintiff's proceedings were irregular, and not null.

COLERIDGE, J.—The defendant might have gone before now to a judge at Chambers, for the purpose of setting aside the proceedings, the levy being on the 15th February.

1841.

HOLMES

v.

RUSSEL.

Thesiger submitted that the proceedings of the plaintiff were not merely irregular, but null (a). No process had been served on the defendant, and no other intimation given that could inform him that proceedings were going on against him.

Cur. ado. vult.

COLERIDGE, J.—This was an application to set aside proceedings for irregularity, and the alleged irregularity was, that no process or notice of proceedings was served on the defendant. The defendant was the accommodation acceptor of a bill of exchange. The time of the bill becoming due passed, and the defendant presumed that it had been paid, and no knowledge of any proceedings by the plaintiff was conveyed to the defendant. On the 15th, execution was levied on the goods of the defendant. As no notice was conveyed to the defendant of the plaintiff's proceedings, no doubt that would be ample ground for setting them aside, if the application for that purpose had been made promptly. I think, however, that the application is now too late. Ever since the case of *Cox v. Tullock* (b), it is clear, where there is an irregularity in any proceedings had in vacation, and there is time in the course of that vacation to apply to a judge at Chambers, it is imperative on the party complaining to do so, and he cannot wait to move to set aside the proceedings till the first four days of the next Term, if by his delay he is likely to change the situation of the other party. No doubt the sheriff, hearing nothing of these objections, would have paid over the proceeds of the levy to the plaintiff, and thus placed the parties in a different situation from that in which they would have stood, if the defendant had applied promptly. I think, therefore, this application is too late, if the objection is an irregularity. But when it is said, that the course pur-

(a) See *Garratt v. Hooper*, ante, ante, vol. 3, p. 551.
vol. 1, p. 28, and *Roberts v. Spurr*, (b) *Ante*, vol. 2, p. 47.

sued by the plaintiff, renders his proceeding not merely an irregularity, but a nullity. It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether a party can waive the objection. If he can waive it, it amounts to an irregularity; if he can not, it is a nullity. I think this objection might be waived. The next objection is, that there was a wrongful affidavit of service, on production of which the plaintiff entered an appearance for the defendant. But suppose the defendant had full notice that an appearance had been entered for him, and he had taken the declaration out of the office, and pleaded, it could not be objected by him, that there was a defective service? The objection might, therefore, be waived, and is, consequently, a mere irregularity. The lapse of time is, I think, a waiver of the irregularity, and, therefore, there ought to be no rule. There is no affidavit of merits made, nor any reason suggested why the defendant would not ultimately be compellable to pay the bill, so that there is no ground for letting him in upon terms.

1841.
 HOLMES
 v.
 RUSSEL.

Rule refused.

FRANKS *v.* WICKS.

PETERSDORFF shewed cause against a rule nisi, obtained by *Tyndale*, requiring the plaintiff to shew cause why the proceedings in this case should not be stayed in the Brighton Court of Requests, on the ground that the matter had already been disposed of in a previous inquiry, which had taken place on a plaint levied in the same Court,

Where a plaint is removed by certiorari out of the Brighton Court of Requests into the Queen's Bench, the affidavit used on an application in the cause so

removed, may be entitled in the Queen's Bench.

When the judge of that Court, in his return to the certiorari, omits some of the proceedings which have taken place, with respect to the plaintiff's claim, the omission may be supplied by affidavit.

A "dismissal" by the judge of the plaint of the plaintiff, after hearing witnesses on both sides, is equivalent to a final determination on the merits, and not merely to a nonsuit.

1841.

FRANKS

v.

WICKS.

when a decision was pronounced in favour of the defendant. *Petersdorff* objected that the affidavit on which the application was founded, was improperly entitled, as it was entitled in a cause in this Court, whereas there was none pending here, although the proceedings had been removed from the Court below by certiorari. The only cause pending was in the Court below. [*Coleridge, J.*—I do not see any difficulty on this point. The proceedings are removed by certiorari, and, therefore, there is a cause virtually depending in this Court. Consequently, the affidavits are properly entitled]. In this case a plaint was levied in the Brighton Court of Requests, which was erected by the 3 & 4 Vict. c. 10. On that occasion, the matter was heard by the judge of the Court, as he was empowered, without the interference of a jury. He heard witnesses on both sides, and then “dismissed” the claim. Subsequently a fresh plaint was levied for the same claim, and the jury, who were empannelled pursuant to the act, found in favour of the plaintiff to the amount of 10*l*. The present rule was then applied for, and a certiorari issued to bring up the proceedings from the Court (*a*). To this certiorari the judge had only returned the proceedings which had taken place on the second occasion. The objection suggested by the defendant to the plaintiff’s proceeding in the manner described, did not appear regularly before the Court, as it should by the return to the certiorari, and by that return only. All that the return shewed was, that the plaintiff had proceeded regularly to recover a verdict for 10*l* in the Court of Requests at Brighton, and therefore, no materials were brought before the Court by which the objection was made apparent. Although certain facts were stated in the affidavits with relation to certain supposed proceedings, it was not competent for the Court to look at those affidavits to supply suggested deficiencies in the return. The Court would assume that all the proceedings in the Court below,

(a) *Ante*, p. 178.

had been returned. If they were, nothing was shewn to the Court which supported the allegation on which this application was founded, namely, that there had been a previous decision of the cause. [*Coleridge, J.*—I think the facts which took place on the former occasion may be stated by affidavit, although none of them appear on the face of the return]. *Petersdorff* then contended, that a “dismissal” of the former case, was only equivalent to a nonsuit in the Superior Courts, and, therefore, could be no bar to further proceedings for the same cause of action. The Court had expressed a doubt in the case of *Webster v. Mason* (a), whether, under the Belper Court of Requests Act, there could be a nonsuit; but that such a proceeding could take place under the Brighton Court of Requests Act was quite clear, as in the schedule of fees at the end of the act, a particular fee was awarded for a “nonsuit.” It was difficult to attach any other meaning to the word “dismissed,” than that of a “nonsuit.” If that was the meaning of the word, then no valid bar whatever was shewn to the plaintiff’s claim, and, therefore, he was perfectly at liberty to prosecute it a second time.

Tyndale, in support of the rule, contended, that as it appeared from the affidavits, that the judge had heard witnesses on both sides, it could not be said that he had merely nonsuited the plaintiff. It was clear, that he had examined into the merits of the case, and, therefore, in having “dismissed” the claim, he had decided that on the merits, the plaintiff could not sustain it.

COLERIDGE, J.—This can not be considered as a nonsuit. Evidence was heard on both sides. The judge was not satisfied that the plaintiff had a valid claim, and, therefore, dismissed the cause. The present rule must, therefore, be made absolute.

Rule absolute.

(a) *Ante*, vol. 8, p. 705.

1841.

FRANKS

v.

WICKS.

1841.

Doe dem. CHADWICK v. ROE.

Where the party interested in premises has become bankrupt, service on his assignees and the messenger in possession under the fiat, is sufficient to obtain a rule for judgment against the casual ejector.

WATSON moved for judgment against the casual ejector. It appeared, by the affidavit supporting the motion, that the person interested in the premises, against whom the action was brought, had become bankrupt. The declaration in ejectment had been served on the assignees, and on the messenger under the fiat, who was in possession of the premises sought to be recovered. This, it was submitted, amounted to a sufficient service to authorize signing judgment against the casual ejector.

WILLIAMS, J.—I think that is a sufficient service, and you may, therefore, take your rule.

Rule granted.

BENNETT, Executor of, &c. of BARKER v. BURTON.

Where a defendant was arrested, and without putting in special bail, he was discharged under 1 & 2 Vict. c. 110, s. 7, he was held not to be entitled to his costs under 43 Geo. 3, c. 46, s. 3.

COWLING shewed cause against a rule nisi, obtained by *Hoggins*, calling on the plaintiff to shew cause why the defendant's costs should not be taxed to him, pursuant to 43 Geo. 3, c. 46, s. 3, the plaintiff having arrested him for a greater sum than was recovered by the verdict, without any reasonable or probable cause. The defendant had been arrested for a sum of 387*l.*, and the amount of the verdict was 170*l.* 2*s.* 6*d.* The arrest had taken place on the 26th of September, 1838, and on the 1st of October the 1 & 2 Vict. c. 110, came into operation. Without putting in special bail, the defendant applied for his discharge, and not having filed a petition for his discharge under any insolvent act, he was set at liberty under section 7, on entering a common appearance. He had not, therefore, been "held to special bail," although "arrested," and, therefore, his case did not come within the meaning of the 43 Geo. 3, c. 46, s. 3. The

words of that section were, "arrested and held to special bail." Unless both acts combined, the defendant was not entitled to his costs under the act. The case of *Bates v. Pilling* (a), was an authority directly deciding that to entitle a defendant to costs under the 43 Geo. 3, c. 46, s. 3, a mere holding to special bail is not sufficient, there must be an arrest and a holding to special bail. The present rule must, therefore, be discharged.

1841.
BENNETT,
Executor of,
&c. of
BARKER
v.
BURTON.

Hoggins supported the rule.

COLERIDGE, J.—The case of *Bates v. Pilling* is a clear authority on the construction of the act of Parliament, that the defendant must be both arrested and held to special bail. Here it is not sworn that he was held to special bail, and, therefore, the present rule must be discharged.

Rule discharged.

(a) *Ante*, vol. 2, p. 367.

REGINA v. HEDGES.

(*Before the four Judges.*)

THIS was a rule nisi for an information in the nature of a quo warranto against the defendant, for exercising the office of Town Councillor of Wallingford. Among the affidavits filed in support of the rule, was an affidavit by one Holmes, deposing that he was a burgess of the borough, and that in case the Court should order the information to be exhibited, it was his intention to be, and to become really and bonâ fide the relator.

On a motion for a quo warranto, an affidavit, stating that it is the intention of deponent, in case the Court should order the information to be filed, to become bonâ fide the relator, is insufficient under

Reg. Gen., M. T., 3 Vict., which requires an affidavit that the motion is made at the instance of deponent as relator.

1841.

REGINA
v.
HEDGES.

Sir *W. W. Follett*, (*W. J. Alexander* with him,) who appeared to shew cause, objected that this affidavit was insufficient under the Reg. Gen., M. T., 3 Vict., by which it was ordered, "that no rule be hereafter granted for filing any information in the nature of a quo warranto, unless at the time of moving, an affidavit be produced, by which some person or persons shall depose upon oath that such motion is made at his or their instance, as relator or relators."

The Attorney General and *Talfourd*, Serjt., contra, contended, that the object of the rule was to identify the relator, and thereby secure the payment of costs, if the motion was unsuccessful; and that the affidavit was sufficient for that purpose. [*Coleridge*. J.—But for that purpose the affidavit should distinctly shew that the motion is made at his instance. That is not done by declaring what his intention is.]

LORD DENMAN, C. J.—This objection must prevail. Every person who made affidavit in support of a motion for a quo warranto, was liable, in the discretion of the Court, to pay costs. The object of the rule was to render the exercise of that discretion unnecessary in future, by making it imperative to disclose on oath who the real relator is, at whose instance the motion is made. We ought not to have granted this rule without a proper affidavit.

LITTLEDALE, J.—If we made this rule absolute, and Holmes should then refuse to become relator, how could we compel him to do so?

COLERIDGE, J.—It is better to require a strict compliance with the rule of Court.

Rule discharged.



1841.

SAUNDERSON and Others v. PARKER.

MARTIN shewed cause against a rule nisi, obtained by *Cresswell*, calling on the plaintiffs to shew cause why the writ of *capias ad satisfaciendum*, issued against the defendant in this case, should not be set aside, and the defendant discharged out of custody, or why the proceedings on the bond should not be stayed. It appeared, from the affidavits, that the defendant was a trader, and having become indebted to his creditors, the plaintiffs made the affidavit required by the 1 & 2 Vict. c. 110, s. 8, for the purpose of making the defendant liable to commit an act of bankruptcy, as suggested in that section. The words of that section were, "That if any single creditor, or any two or more creditors, being partners, whose debt shall amount to one hundred pounds or upwards, or any two creditors whose debt shall amount to one hundred and fifty pounds or upwards, or any three or more creditors whose debts shall amount to two hundred pounds or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such

Where a bond is given pursuant to 1 & 2 Vict. c. 110, s. 8, a render may be made before judgment, although a literal construction of the words of the condition would require a render afterwards.

An affidavit of the notice of render need not now be made pursuant to Reg. Gen., 1 Ann. T. T.

After the render, if the plaintiff lodges a *ca. sa.* with the sheriff against the defendant, it is irregular, and the Court will set it aside, and stay proceedings on the bond.

1841.
SAUNDERSON
and Others
v.
PARKER.

costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise." A bond was given by the defendant, pursuant to the statute, the condition of which was in the following form: "That if the said W. Parker, his executors or administrators, shall pay such sum or sums of money to the said R. Sanderson, W. Morris, and R. S. Gard, or one of them, their or some one of their executors, administrators or assigns, as shall be recovered in the said action, or in any other action which may have been or shall hereafter be brought for the recovery of the said alleged debt, together with such damages and costs as shall be given in the same; or shall render himself to the custody of the gaoler of the Court in which the said action, or any other, is brought for recovery of the said alleged debt, according to the practice of such Court or Courts, within such time and in such manner as the said Court or Courts, or any judge thereof respectively shall direct, after judgment shall have been recovered in such action or actions, or shall obtain a legal discharge or release from the said alleged debt, then the present obligation to be void, but otherwise to stand and remain in full force and effect." This condition differed from that provided by the act of Parliament, as it omitted the word "or" before the words "within such time." The effect of this omission was, that a tender to be made by the sureties could only regularly be made after judgment was signed. In the present case, process was sued out, and after issue had been joined, the plaintiffs gave

notice of trial for the third sittings in Michaelmas Term, and that the cause would be taken as undefended. On the sitting day, counsel appeared for the defendant, and on producing an affidavit of merits, the cause stood over for the adjournment day, with judgment of the term. On the 3rd of December, Mr. Justice *Coleridge* made an order for the render of the defendant, at the instance of the sureties, and the render accordingly took place on that day. Notice of the render was given to the plaintiffs, but no affidavit of that notice was made. The sureties then took out a summons before Mr. Justice *Patteson*, requiring the plaintiffs to give up the bond to be cancelled. The parties appeared before his lordship, but he was of opinion that he had no power to interfere in the way required, and accordingly made no order. Since that, the plaintiff sued out a writ of *capias ad satisfaciendum* against the defendant, in order to fix the sureties. Notice of this writ having been lodged with the sheriff, was given to both sureties on the 15th January. The plaintiff did not take any proceedings on the *capias ad satisfaciendum*, and the present rule was subsequently obtained on the 22nd January to set aside that writ. *Martin* contended, that the condition of the bond had not been fulfilled by rendering the defendant before judgment was signed. In the case of *Owston v. Coates* (a), the Court of Queen's Bench had held, that a trader who has entered into a bond, with sureties, under 1 & 2 Vict. c. 110, s. 8, might be rendered by his sureties before judgment. There, however, it would be found, on examination of the terms of the bond, that it was strictly conformable to the provisions of the statute, and, therefore, it was consistent that the render might take place before the judgment was signed. The condition of the bond in the present case having omitted the word "or," could only be satisfied by a render after judgment. If even the Court thought that the render might be affected before judg-

1841.

SAUNDERSON
and Othersv.
PARKER.

(a) 2 P. & D. 485; 10 A. & E. 198, S. C.

1841.
SAUNDERSON
and Others
v.
PARKER.

ment signed, the render was not regularly made according to the practice of the Court; because, although notice of the render having been made, was given to the sureties, no affidavit of that notice had been sworn. This, according to the rule II. of Trinity Term, 1 Anne, was necessary, in order to entitle the bail to be discharged. Under these circumstances, the defendant could not be considered as regularly in custody by the render which had been effected. The plaintiffs were, therefore, perfectly authorized in pursuing the course they had. As to the branch of the rule requiring proceedings to be stayed on the bond, that could not succeed. No proceedings had been taken on the bond, and, therefore, none could be stayed, and with respect to future proceedings, the Court could not issue an injunction. With respect to the relief which the sureties ought to obtain in this case, no power was given to the Court by the statute to relieve them. The case was different from that of the bail, who, by the provisions of the statute of 4 Anne, c. 16, s. 20, might be relieved by the Court there, for an authority was given. The bond in question was given by the sureties pursuant to the provisions of the act, and according to those provisions, the Court must proceed. As no power was given by those provisions to relieve the sureties, they were not entitled to obtain any relief. The plaintiffs did not object to the defendant being discharged.

Cresswell supported the rule, and contended, that the defendant was regularly rendered according to the practice of the Court, in pursuance of the condition of the bond. The word "or" had no doubt been omitted in the condition, but that omission would not interfere with the clear meaning of the condition and the intention of the parties. The Court would construe the condition according to that intention. The clear intention was, that the sureties should be at liberty to render the defendant to custody, according to the practice of the Court, before judgment. Such a render had been regularly effected.

Notice of the render had been given to the plaintiffs. As to the affidavit of notice of render, that was not necessary in order to make the render perfect, for, the only object of the rule of Court was in requiring the affidavit alluded to on the other side to be made, was to enable the parties to obtain the bail piece from the office. It was an affidavit required for the satisfaction of the officer, to make it appear that the render had been made, and notice given to the proper parties. That did not make the render itself more perfect. The case then of *Owston v. Coates*, was then a clear authority in favour of the application. It was contended, on the other side, that the latter part of the rule was insurmountable, because, no proceedings had been taken on the bond. But though, strictly speaking, that might be so, the lodging the *capias ad satisfaciendum* was a preliminary step, and which was irregular, as the defendant was in custody in the same suit. The Court had, therefore, jurisdiction to stay proceedings on the bond, even supposing that it should not think it right to set aside the *capias ad satisfaciendum*, in order to enable the sureties to render the defendant.

1841.
 SAUNDERSON
 and Others
 v.
 PARKER.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for setting aside the *ca. sa.*, and staying all proceedings on the bond under the following circumstances. The bond had been given under the 1 & 2 Vict. c. 110, s. 8. Before the trial, an *ex parte* order was obtained to render the defendant in discharge of his sureties; the render was made and notice given, whereupon the pleas were withdrawn, and final judgment signed, on which, the *ca. sa.* was issued for the purpose of fixing the sureties. Cause was shewn upon several grounds, one of which was disposed of in fact, namely, the alleged want of a *committitur*, which appeared upon the affidavit to have been duly made. Then it was said, that the render had not been made in pursuance of the condition of the bond. Upon referring to that instrument, it appeared that by inadvertence,

1841.
 SAUNDERSON
 and Others
 v.
 PARKER.

the word "or" had been omitted, and instead of being conditioned to render, &c., according to the practice of the Court, *or* within such time and in such manner as the said Court, or any judge thereof shall direct, after judgment shall have been recovered in such action, the condition ran with the same words, omitting only the word "*or*." Upon this, it was argued that a render before judgment was irregular, for that the words "after judgment," over-rode the whole sentence, so that no render could be made until after judgment. In *Owston v. Coates* (a), the Court decided that the words "after judgment," do not, in the statute, apply to a render "according to the practice of the Court." According, therefore, to the spirit of that decision, the statute divides at the disjunctive "or," and the latter branch becomes insensible if the disjunctive "or" be omitted. As then this render was before judgment, if it was according to the practice of the Court, which, for the purpose of the present objection, I may assume it to be, I think I am quite at liberty to reject as superfluous the words which follow "the practice of the Court" from the condition, and so this objection will fail. But then it was said, that there had been no affidavit of the notice of the render, and that by R. G., 1 Anne, Trin. T. 2, such an affidavit was a necessary preliminary to the discharge of the bail, and without it, the render was void. This point came before the Courts in the case of bail, in *The King v. The Sheriffs of Middlesex* (b), and the Court "held, that the affidavit was necessary only in order to get the bail-piece out of the office, and was not necessary to make the render complete, so as to discharge the bail." But in cases like the present, there is no bail-piece, and I am, therefore, authorized in saying, that the affidavit is not necessary for any purpose; and although the render is to be according to the practice of the Court, it is clear that these words must receive a liberal interpretation; a literal following of the practice in bail cannot

(a) 10 Ad. & El. 197; 2 Per. & Da. 485. (b) 1 Chit. Rep. 360.

be required in all particulars, and it is rather by way of analogy than in exact detail, that compliance at all is required. It was, however, argued that the ca. sa. being sued out to fix the bail was regular, because, although the defendant was in custody, he was not so by any act of the plaintiff. But as the object of a ca. sa. against the principal is to give the bail notice, and where the principal is already in the sheriff's custody, although at the suit of another person, it has been decided, that the plaintiff cannot have a return of non est inventus to it; it seems to me, applying the principle of those decisions to the present case, that this ca. sa. was unnecessary and irregular, the defendant having been already committed to prison in this very cause, at the instance of the sureties or bail, and with notice thereof to the plaintiff. This rule will, therefore, be absolute for setting aside the ca. sa., and staying all proceedings on the bond. The rule also extended to the discharge of the defendant out of custody as to this action, to which no opposition was made.

1841.
 SAUNDERSON
 and Others
 v.
 PARKER.

Rule absolute, with costs.

REGINA v. The JUSTICES of SHREWSBURY and SALOP.

(*Before the Four Judges.*)

THIS was a rule nisi, for a certiorari to remove an order of justices for the appointment of overseers, dated the 7th of April, 1840. The order purported to be made by "William Wyburgh How, Esq., mayor, and Thomas Girdler Gwynn, Esq., two of her Majesty's justices of the peace for the borough of Shrewsbury, and Henry Diggory Warton, Esq.,

The notice to justices, required by the 13 Geo. 2, c. 18, s. 5, for removing their order by certiorari, should state the name of the party intending to sue

forth the writ; and on motion for the certiorari, the Court must be satisfied on the affidavits, that the party so named is the party by whom, or on whose behalf, the notice was given, and the application is made.

The justices, on whom the notice was served must be identified with the justices who made the order.

It is not sufficient if it appears on the affidavits, that an order of the same date, and to the effect described in the notice, was made by justices of the same name as those to whom notice was given.

Enlarging the rule nisi, by consent, will not cure objections to the notice.

1841.
 REGINA
 v.
 The Justices of
 SHREWSBURY
 and
 SALOP.

and the Rev. Charles Leicester, clerk, two of her Majesty's justices of the peace for the county, &c.," and appointed four persons (naming them) to be overseers of the parish of St. Julian, in that borough. The notice of the intended application for this rule was as follows:—"To William Wyburgh How, Esq., mayor, and Thomas Girdler Gwynn, Esq., two of her Majesty's justices of the peace for the borough of Shrewsbury, and Henry Diggory Warton, Esq., and the Rev. Charles Leicester, clerk, two of her Majesty's justices of the peace of the county of Salop. Take notice, that an application will be made to her Majesty's Court of Queen's Bench at Westminster, on Wednesday, &c., that a writ of certiorari may issue to remove into the said Court all and singular orders and warrants of appointment of (naming the four persons as in the order) to be overseers of the poor of the parish of St. Julian. (Signed) Edward Leake, Assistant Overseer." An affidavit was made of service of this notice on four justices, bearing the same names as those in the order and notice, but it did not, in any other way state that they were the justices who made the order. The rule had been enlarged to this Term, by consent.

The Attorney General and *Mr. Yardley*, in shewing cause, objected, that under stat. 13 Geo. 2, c. 18, s. 5, the notice did not sufficiently appear on the face of it to have been given "by the party suing forth the certiorari," *Rex v. The Justices of Lancashire* (a), *Rex v. The Justices of Cambridgeshire* (b). Again, the affidavits did not shew, otherwise than by the identity of names, that the notice was served on the justices who made the order.

Sir *W. W. Follett* and *Whateley*, contra. The statute requires, not that the notice shall state who is the party suing forth the certiorari, but that the party suing forth the

(a) 4 B. & Ald. 289.

(b) 3 B. & Ad. 887.

writ shall give notice. The party may be connected with the notice by proof aliunde. [*Coleridge, J.*—How does it appear here that Leake, who signs the notice, is the party making this application?] He alone makes affidavit on the merits. [*Coleridge, J.*—The reason why the notice should disclose who is the party suing out the writ, is, that the justices may have the opportunity to appear to shew cause, in the first instance, against granting the rule; and one ground of objection may be, that the party giving notice is a stranger, as in *Rex v. The Justices of Lancashire (a)*]. The object of the statute has been effected in the present case by the appearance of the justices, and the objections now taken, are cured by their consent to enlarge the rule. As to the service of the notice, *Reg. v. The Justices of Wiltshire (b)*, shews it to be sufficient. The identity of names is presumptive proof; the person who serves the notice may have no knowledge of the order, or of the justices who made it.

1841.
 REGINA
 v.
 The Justices of
 SHREWSBURY
 and
 SALOP.

LORD DENMAN, C. J.—The statute requires proof, on oath, that the party suing forth the certiorari has given notice to the justices who made the order. I find no proof here that the assistant overseer is the party suing out the writ, either for himself or on behalf of others; nor does it appear satisfactorily that the justices who were served with notice, were the justices who made the order. It is too much to say that the object of the statute has been attained by the appearance of the justices, or that their consent to the enlargement of the rule has waived the objection.

LITTLEDALE, J., WILLIAMS, J., and COLERIDGE, J., concurred.

Rule discharged.

(a) 4 B. & Ald. 289.

(b) *Post*, p. 524.

1841.

REGINA v. STEPHEN JONES.

A rule called on the prosecutor of a certiorari issued to remove an order of sessions confirming, without appeal, an order of justices, made pursuant to 55 Geo. 3, c. 68, s. 2, for stopping up a footpath, to shew cause why it should not be quashed, the recognizances required by 5 Geo. 2, c. 19, s. 2, not having been entered into, previous to the writ being issued; although they were entered into after the allowance: *Held*, that the statute only applied to cases where there was an appeal to the sessions, and not to cases where the order was confirmed without appeal; 2ndly, that the application should have been to quash the allowance, and not the writ itself; and the Court refused to mould the rule, so as to quash the allowance.

V. WILLIAMS shewed cause against a rule nisi, obtained by *Adams*, Serjt., calling on the prosecutor to shew cause why the writ of certiorari, issued in this case, should not be quashed, quia improvidè emanavit, and a writ of procedendo awarded. The certiorari had issued to remove an order of justices, made pursuant to 55 Geo. 3, c. 68, s. 2, for stopping up a footway. The order had been confirmed, without appeal, at the Quarter Sessions. The certiorari was then issued, but without entering into the recognizances required by the 5 Geo. 2, c. 19, s. 2, and allowed by the Quarter Sessions. Afterwards, the recognizances were entered into, and filed. The present rule was then obtained to quash the certiorari. *V. Williams* submitted, first, that the present case did not come within the meaning of the 5 Geo. 2. The order in question was not confirmed on appeal, but without appeal. The statute of 5 Geo. 2, only applied to orders confirmed on appeal. This appeared by the title of the act. It was "an Act to oblige the Justices of the Peace at their General or Quarter Sessions, to determine *appeals* made to them according to the merits of the case, notwithstanding defects of form in the original proceedings, and to oblige persons suing forth writs of certiorari, to remove orders made on such *appeals* into his Majesty's Court of King's Bench, to give security to prosecute them with effect." Proceedings on appeal were spoken of throughout. In section 2, it was clear, that reference was made to the same orders as those contemplated by section 1, and, therefore, to proceedings on appeal. A note was appended by the reporters to the case of *Rex v. Dunn* (a) to the same effect. In that case, it was not decided by the Court that it was necessary that such recognizances should be given before the writ of certiorari issued,

(a) 8 T. R. 217.

but merely that the amount of recognizance should be in the single amount of 50*l.*, and not two amounts of 25*l.* each. He cited *R. v. Jenkinson* (a). But supposing that it was necessary to enter into recognizances in such a case as the present, the application was misconceived, as the statute only required the recognizances to be entered into previous to the *allowance*, and not the *issue* of the writ of certiorari. The application, if any, should have been to quash the allowance and not the writ itself. The certiorari was perfectly regular. In *R. v. Abergele* (b), the recognizances had not been duly entered into, and the sessions, notwithstanding, allowed it. The Court of King's Bench quashed the allowance, but sent back the writ to the sessions, to have it duly allowed, after the parties prosecuting the writ should have entered into a proper recognizance. Under any view of the case, the present rule must be discharged.

1841.

REGINA

v.

STEPHEN
JONES.

Adams, Serjt., supported the rule, and contended, that the case came clearly within the spirit of the 5 Geo. 2, c. 19, if not within its words, and therefore the Court would be inclined to give effect to so beneficial a statute by a liberal construction, rather than a narrow one. With respect to the form of the rule, the case of *R. v. Abergele*, already referred to, was an authority to shew that the Court would mould the rule, so as to answer the circumstances of the case. There, the original application was to quash the certiorari, but the Court moulded the rule so as to quash the allowance. No objection could exist to such a course being pursued in the present case.

Cur. adv. vult.

COLERIDGE, J.—This was an application to quash a certiorari, and to award a procedendo, the certiorari having issued to remove an order made by two justices, under 55 Geo. 3, c. 68, s. 2, and which had been confirmed without

(a) 1 T. R. 82.

(b) 5 Ad. & El. 795; 1 Nev. & Per. 235.

1841.

REGINA

v.

STEPHEN
JONES.

appeal by the Quarter Sessions. The ground of objection to the removal, rested on the 5 Geo. 2, c. 19, s. 2, which requires that before any certiorari shall be allowed to remove the judgments therein referred to, the party prosecuting it shall enter into the recognizance there specified; and it was objected and admitted that no such recognizance had been entered into, before the allowance of the certiorari in question. But it was first urged that the statute in its terms applied not to the order of magistrates out of sessions, but to judgments at sessions confirming such orders. It is only necessary however, to compare the language of the second and first section of this statute to perceive that the judgments or orders spoken of in the recital, and enacting part of the second section are judgments or orders given or made by justices out of sessions, the proceedings upon which, in case of appeal, it was intended to prevent the interruptions of by the too frequent and vexatious use of the writ of certiorari. It was then objected, secondly, to the application, that although improperly allowed, the writ itself had been properly issued, and the cases of *Rex v. Dunn* (a), and *Rex v. Abergele* (b), were cited as authorities, to shew that where the objection was the want of a proper recognizance, the Court would quash the allowance, but leave the writ itself untouched. In both those cases, the recognizance was correct in point of time, but defective in other respects. They are, however, authorities, to shew that this rule was misconceived, as directed against the writ itself; for the ground on which they proceeded was, that the respective recognizances were nullities, and, therefore, that none had been entered into before allowance, which is the very objection here made. The Court, in the case of *Rex v. Dunn*, simply discharged the rule, and refused to take any notice of the writ, until a proper recognizance having been entered into, it should be again allowed and returned. In the latter case, they enlarged the time for a return to be made, after the entering

(a) 8 T. R. 217.

(b) 5 Ad. & El. 795; 1 Nev. & Per. 235.

into the proper recognizances, and a new allowance by the sessions. It appears, that recognizances have been entered into in this case, and are now upon the file. Although, therefore, upon an application directed formally against the allowance, the Court might be bound to quash it, yet that would probably, in the end, be productive of no benefit to the defendant; and, at all events, the statute being now substantially complied with, I do not feel called on to mould the rule as was done in *Rex v. Abergele*. It will, therefore, be discharged, but, under the circumstances, without costs.

Rule accordingly.

1841.

REGINA
v.
STEPHEN
JONES.

BAILEY and Another v. BELLAMY and Others.

(Before the Four Judges.)

GRAY had obtained a rule nisi, to set aside a warrant of attorney, and all subsequent proceedings, for irregularity. It appeared that the warrant of attorney, which was to confess judgment for 1000*l.*, was executed by the defendants in the presence of an attorney, who subscribed his name as a witness, pursuant to stat. 1 & 2 Vict. c. 110, s. 9, as follows:—
“Signed, sealed, and delivered by the said (defendants) in my presence, and I declare myself to be the attorney for the said (defendants), and I subscribe as such attorney, (Signed) J. S. C.” Before judgment was entered up, an alteration was made in the warrant, by agreement between the plaintiffs and defendants, by substituting the sum of 2000*l.* for the sum previously inserted, and the defendants immediately re-executed the warrant in the presence of J. S. C., by retracing their signatures with a dry pen, and again delivering the instrument as their act and deed.

A warrant of attorney to confess judgment for 1000*l.* was executed by the defendant, and an attestation of the execution was subscribed by an attorney, pursuant to stat. 1 & 2 Vict. c. 110, s. 9. An alteration was afterwards made by consent, in the sum, by substituting 2000*l.*; and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The

attorney, who was present, wrote his initials opposite to the alteration, and drew a dry pen over the attestation, and over each letter of his own signature: *Held*, that the warrant of attorney was not duly attested under the 9th section of the statute.

1841.

BAILLY
and Another
v.
BELLAMY
and Others.

J. S. C. said, "I must go through the same formalities," and, thereupon, drew a pen over the previous attestation, and over every letter of his former signature, saying, "I subscribe myself as such attorney." He also wrote his initials on the margin of the warrant opposite to the alteration. This rule was obtained on the ground that this attestation and subscription were insufficient under the 1 & 2 Vict. c. 110, s. 9.

R. V. Richards and *Petersdorff* now shewed cause, and contended, that tracing the name was a sufficient signature, and that it had been so held under the Statute of Frauds. But even that form was unnecessary. An attorney, by explaining to the parties the nature of the instrument, and subscribing the attestation, had at once satisfied the 1 & 2 Vict. c. 110, and a subsequent alteration in the sum, by consent of the parties, would not render his presence again necessary.

Cresswell, contra. The effect of the alteration after signature by the parties, was to make the warrant a new instrument, and a fresh execution was necessary. The attestation and subscription by the attorney with a dry pen, would have been wholly nugatory on occasion of the first execution, and was equally insufficient on the second. The 10th section enacts, that the mere understanding of the nature and effect of the warrant, shall not cure a defective execution.

LORD DENMAN, C. J.—The statute 1 & 2 Vict. c. 110, requires attestation and subscription, and a declaration that the subscription is made in a particular character. I cannot say that the requisitions of the statute have been complied with in the present instance.

LITTELDALE, J.—An attestation in compliance with the statute was necessary to the validity of the instrument after the alteration, and as strictly to be observed in the

mode of effecting it, as it was on the first occasion of the execution.

WILLIAMS and COLERIDGE, Js., concurred.

1841.
 BAILEY
 and Another
 v.
 BELLAMY
 and Others.

Rule absolute.

REGINA v. The JUSTICES of DENBIGHSHIRE.

DUNDAS shewed cause against a rule for issuing a mandamus, to be directed to the justices of Denbighshire, commanding them to enter continuances, and hear an appeal against an order for the removal of a person named Roberts. A notice of chargeability, a copy of the order of removal, and a copy of the examination on which the order was founded, were sent to the appellant parish, pursuant to section 79 of 4 & 5 Wm. 4, c. 76. No step was taken by the appellants within the twenty-one days from sending the above papers, and the pauper was removed. On the 10th June, notice of appeal was given, and a statement of the grounds of appeal sent to the respondents, pursuant to section 81 of the statute. The grounds of the appeal were: first, that the pauper had slept forty nights in a third parish; and, second, that there was no date to the notice of chargeability. In the notice of appeal, the order of removal was described as having been made by "*R. H. Cundy*," instead of "*B. Cundy*." When the appeal came on to be heard, the objection was taken that there was no such order in existence as the one mentioned in the notice of appeal. The justices imported their own knowledge into the case, that there was a magistrate in the county who signed his name "*R. H. Cundy*," and, therefore, it might be that there was another order against which the appeal really was, but that the notice of appeal clearly misdescribed the order of removal, against which the appeal was, and, therefore, the sessions refused to hear the appeal.

Where a notice of appeal described the order of removal as made by *R. H. Cundy*, and another magistrate, instead of *B. Cundy*, there being two magistrates in the county, whose respective christian names commenced with those initials, and the Quarter Sessions refused to hear the appeal, on the ground of the variance, the Court granted a mandamus to compel the hearing of the appeal.

1841.
REGINA
v.
The Justices of
DENBIGH-
SHIRE.

An affidavit was now made that there were two justices of the county whose Christian names had those different initials. It was submitted that the sessions were right in thus refusing to hear the appeal, as it must be against some order of removal, but it did not appear that any such order was in existence, as the one mentioned in the notice of appeal. If such a variance was permitted to pass, the variance in both surname and christian name would be allowed to be immaterial. Ultimately no description of the order need be given at all. Under these circumstances, it was submitted that the present rule ought to be made absolute.

Sir *F. Pollock* and *Hayes*, contra, were stopped by the Court.

WILLIAMS, J.—The question is, whether this was such a total variance in the description of the order, as to shew that this was a forgery, and that there was no order of removal at all corresponding with the one mentioned in the notice of appeal. The parties to the order and the pauper are correctly described. Who could doubt that this was a valid order, made by persons of competent authority? The case is different from questions of variance in setting out an agreement, or a deed in a declaration. It is a total perversion of terms, to consider this like a description in pleading; it is nothing of the kind. The object of the notice of appeal is to give the opposite party notice that the appellants have been aggrieved by an order of removal, perfectly agreeing in description and other respects, with the one actually made. But the sessions have got into apices juris, and nice questions of variance, instead of doing what would be more consonant with the justice of the case. It was quite unnecessary that they should consider such nice points. This rule must, therefore, be made absolute.

Rule absolute.

1841.

PIGEON and Others v. OSBORNE.

(Before the Four Judges.)

ASSUMPSIT on a bill of exchange, with a count for goods sold and delivered. Pleas; as to all the sums in the declaration mentioned, except 27*l.*, non assumpsit. Secondly, that the said goods were, with the knowledge, privity, and consent of the plaintiffs, sold and delivered to the defendant by one Hood, being the agent and factor of and for the plaintiffs, in his, the said Hood's, own name, as the true and sole owner thereof, and as and for his, the said Hood's, own proper goods. And that the plaintiffs did not appear, nor were they known by the defendant, at or before the time of the said sale and delivery, &c. to the defendant, as the proprietors of the same, or that they, the plaintiffs, were in any wise interested therein. And that the defendant accepted and received the said goods of and from the said Hood, as the proper goods of him, the said Hood, and that credit for the said goods was then given by the said Hood to the defendant. The plea then went on to allege, that Hood was and is indebted to the defendant in a large amount, &c., out of which the defendant offered to set off the damages. Verification. Replication to the second plea, that the goods mentioned in the said plea were not, with the knowledge, privity, or consent of the plaintiffs, sold and delivered to the defendant, by the said Hood, in his, the said Hood's, name, as the true and sole owner thereof; and as and for his, the said Hood's, proper goods, in manner and form, &c. &c. Demurrer, on the ground that the replication amounted to a negative pregnant, and was ambiguous, as it left in doubt whether it was intended to traverse the sale, or the consent of the plaintiffs.

In assumpsit for goods sold and delivered, the defendant pleaded that the goods were, with the knowledge and consent of the plaintiffs, sold to the defendant, by one H., being the agent of the plaintiffs, in his own name, as the true owner, &c. Replication, that the goods were not, with the knowledge and consent of the plaintiffs, sold to the defendant by H., in his name, as the true owner, in manner and form, &c. Demurrer, on the ground, that the traverse was a negative pregnant and ambiguous: Held, that the demurrer was frivolous.

COLERIDGE, J., made an order, at Chambers, to set aside this demurrer as frivolous; and

1841.
PIGEON
and Others
v.
OSBORNE.

Charnock now moved to rescind this order. It is uncertain whether the plaintiffs, in their replication, intend to traverse the fact of a sale of the goods by Hood as the true owner, or their alleged privity and consent. [*Littledale, J.*—They deny the whole allegation. A special traverse was not necessary.] In *Myn v. Cole* (a), which was an action of trespass for entering the plaintiff's house, the defendant pleaded that he entered by license of the plaintiff's daughter; to which the plaintiff replied, that he did not enter by her license. This was considered as a negative pregnant, and it was held that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together. He cited also *Doctr. Plac.* 259.

LORD DENMAN, C. J.—This demurrer is frivolous. The defendant could not be misled by the traverse in the replication. The plea consists of two parts, *viz.* the alleged sale by Hood, the agent, in his own name as the owner, with the privity of the plaintiffs, and the set-off, which is subordinate to the former. The plaintiffs deny the first part.

LITTLEDALE, J.—The replication puts in issue all the material allegations in the first part of the plea. It is quite correct.

COLERIDGE, J.—There is no uncertainty in the traverse. It denies that a sale was made by Hood, in his own name, as the owner, with the privity of the plaintiffs.

Rule refused.

(a) Cro. Jac. 87.

1841.

Ex parte SHARPE.

IN this case, the defendant was brought before the Court on a writ of habeas corpus, by the keeper of the gaol of Cambridgeshire, and the return set forth, as the cause of his detainer, a warrant under the hands of certain commissioners of taxes of the Cambridge district, and which was backed by a magistrate of the county of Lancashire, and a magistrate of the county of Gloucestershire.

Manning, Serjt., moved to discharge the applicant out of custody, on the ground that he was illegally detained, by virtue of a warrant executed out of the jurisdiction of the persons who had issued it. The warrant was issued by the commissioners of taxes of the Cambridge district, under the authority of the 3 Geo. 4, c. 88, s. 3. The words of that section were, "That if any collector or collectors of the said duties and sums of money aforesaid, or any of them, shall neglect or refuse to pay any sums or sums of money which shall be by him or them received as aforesaid, as in and by the said several acts or by this act is directed, and shall detain in his or their hands any money received by him or them, and not pay or account for the same in manner directed by the said acts or this act, the commissioners acting in the execution of the acts relating to the said duties, or any two or more of them, in their respective districts, are hereby authorized and empowered to imprison the person, and seize and secure the estate, as well freehold as copyhold, and all other estate, both real and personal, of such collector or collectors, wheresoever the same can be discovered or found." The defendant was taken at Cheltenham, and was now imprisoned at Cambridge. [*Williams*, J.—How does that appear? 'The return is conclusive.] There is no affidavit, certainly, to shew that he is improperly in the custody of the Cambridge gaoler. But on the back of the warrant are indorsements, made by magistrates

Where a warrant for the apprehension of a defaulter, under the 3 Geo. 4, c. 88, s. 3, was issued by commissioners of taxes of the Cambridge district, and it was backed by justices of Lancashire and Gloucestershire, and on a return to a habeas corpus, it appeared that the defendant was in custody on the warrant in Cambridge gaol, the Court refused to discharge him, on a suggestion that he had been apprehended at Cheltenham, being clearly in legal custody at Cambridge.

1841.

Ex parte
SHARPE.

of Liverpool and Gloucester, from which it must be assumed that the defendant is now in custody by virtue of those indorsements. But by the 24 Geo. 2, c. 55, s. 1, magistrates are only authorized to back warrants of magistrates, not of commissioners of taxes. Then the commissioners had only power to issue their warrant in the district of the county of Cambridge, and the backing their warrant by Gloucestershire magistrates could not render an arrest by virtue of their warrant valid. [*Williams, J.*—Suppose a party in custody on a good warrant, and there has been the most grossly illegal treatment of him in his caption, I could not interfere to relieve him. There might, perhaps, be some ground for proceeding against the magistrate.] If a party is illegally arrested on a Sunday, the plaintiff could not make his detention good, by issuing a good writ afterwards. So here, a party having been wrongfully taken at Cheltenham, on a warrant issued by persons who have only jurisdiction in the county of Cambridge, no backing by the magistrates of the county of Gloucester will render the arrest valid.

Waddington opposed the application on behalf of the commissioners of taxes. There was no evidence that the defendant had been arrested at Cheltenham. On looking at the return, it did not appear that the indorsements on the warrant had been acted upon. There was nothing to shew, on the face of the return, that the defendant had not been taken into custody in the town of Cambridge, quite independent of the indorsements. But even if he was taken at a place out of the jurisdiction of the commissioners, they had clearly a right to arrest the defendant wherever they could find him. Their power to arrest was not confined to the district for which they acted. If the construction contended for was adopted, it would render the act of Parliament perfectly nugatory. The provision “wheresoever found” might apply to the person as well as estate. But, supposing the construction contended for by the other side was allowed

1841.

Ex parte
SHARPE.

to prevail, the defendant could not be discharged. If, when the return was made to the habeas corpus it appeared that the defendant was detained for a legal cause, the Court would not interfere. Suppose a person to have escaped into France, and having been pursued, was brought back, it would not be contended that he could be discharged, because the original taking was in France, where the Court had no jurisdiction (a). In the case of the *Canadian Prisoners*, (In the matter of *Parker and Others*) (b), a decision to that effect was pronounced. There it appeared, by the return of the gaoler of Liverpool, that the prisoners applying had confessed themselves guilty of treason, and being, therefore, liable to be lawfully detained by the gaoler, although they had originally been arrested in Canada, the Court would not interfere to release them. The case of *The Queen v. Batcheldor*, in the matter of the *Canadian Prisoners* (c), was in conformity with that view. In *Ex parte Krans* (d), persons were detained without any warrant on board one of his Majesty's ships of war, on a charge of smuggling, and on suspicion of murder. They were brought up by writs of habeas corpus, and it appeared, by the return to those writs, and to a certiorari which issued at the same time, that the prisoners might be guilty of the offences imputed to them. The Court refused to discharge them out of custody, and committed them to the custody of the Marshal, in order that they might be taken before some competent authority to be examined touching the matters contained in the return, and to be further dealt with according to law. That was a much stronger case than the present, as there, the parties

(a) See *Ex parte Scott*, 4 M. & R. 361; 9 B. & C. 446, S. C., where a party, against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad, and brought her in custody, and committed to

custody for want of bail, the Court refused to discharge her, on the ground that she had been improperly apprehended in a foreign country.

(b) 5 M. & W. 32.

(c) 1 P. & D. 516.

(d) 1 B. & C. 258.

1841.

Ex parte
SHARPE.

were not detained by virtue of any warrant, but here, the defendant was in custody on a warrant, which was *prima facie* legal, as issued by competent authority. Being so detained, the Court would not, merely on the ground of the original caption being illegal, direct him to be discharged.

WILLIAMS, J.—I do not think there is anything apparent to raise the objection made by my Brother *Manning*, because, granting that his arguments would be sustained, if the fact did appear upon this return to the writ of *habeas corpus*, how does it appear where he was taken on this warrant? Because, although I see on the face of the warrant two indorsements, which I concede is not properly backed, because it is not a warrant of a justice of the peace, yet there is nothing to shew that he was taken either at Gloucester or Liverpool. It might have been a precautionary measure, for anything I know, to try to take him at those places, on the supposition that he was there, or about to be there. But it does not appear that he was so captured, nor is there anything to shew that he might not have returned to Cambridge, and been taken within the borough of Cambridge, within which the commissioners had power to act, as appears on the face of their own proceeding, which is not controverted. No objection is made to the form of the warrant. I must assume that this warrant was issued by persons competent to issue it, within the borough of Cambridge, and that the person in whose hands it was put to execute it, had authority so to do in Cambridge, to which their jurisdiction extended. There is nothing to shew the contrary of his being so taken, and, therefore, I think I ought not to discharge the defendant.

Defendant remanded.

1841.

PURCHELL v. SALTER.

(Before the Four Judges.)

DEBT for 100*l*. for goods sold and delivered, and on an account stated. Plea, as to the first count of the declaration, that so far as the same relates to the sum of 23*l*., parcel, &c., the plaintiff ought not to maintain his action, because the plaintiffs sold and delivered the said goods in that count mentioned, so far as the same relates to the said sum of 23*l*., to the defendant, by and through the medium of one George Mason, who, at the time of such sale and delivery, was the factor and agent of the plaintiff in that behalf, and entrusted by him with the said last-mentioned goods. And the defendant says, that the said George Mason, so being such factor or agent, and intrusted as aforesaid, with the consent of the plaintiff, sold the said last-mentioned goods to the defendant in his, the said George Mason's, name, as the true and sole owner thereof, and as and for his, the said George Mason's, proper goods; and that the said George Mason then appeared to be such true and sole owner by the plaintiff's consent; and that the plaintiff did not appear, nor was he known by the defendant, at or before the time of the said sale, as the proprietor of, or to be interested in the said last-mentioned goods; and the defendant then bought and received the said last-mentioned goods of and from the said George Mason as his, the said George Mason's, proper goods, and did not know, and had not the means of knowing that the plaintiff was the owner of the said last-mentioned goods, or interested therein, or that the said George Mason was only an agent in this behalf. The plea then went on to allege, that before and at the time of the sale, the said George Mason was, and continually hath been, and is indebted to the defendant

De injuriâ, &c., may be replied in an action of debt on simple contract, but subject to the rules and exceptions in Crogate's case, which govern its admissibility in actions of tort.

In debt for goods sold and delivered, the defendant pleaded that the plaintiff sold and delivered the goods by one M., his agent; that M. as such agent, and with plaintiff's consent, sold the goods in his own name, as the true owner; that the defendant did not know, and had not the means of knowing the plaintiff to be the owner, and bought and received the goods as the proper goods of M.; that at the time of the sale, M. was, and is indebted to the defendant, in a sum exceeding the debt and damages, and that the defendant is wil-

ling to set off the monies so due from M. The plaintiff replied de injuriâ, &c. : Held, on demurrer to the replication, that the plea was good, as a plea in excuse, and that de injuriâ, &c., might be replied to it.

1841.
 PURCHELL
 v.
 SALTER.

in 30*l.* for goods and chattels, and of horses, &c., before then sold and delivered by the defendant to the said George Mason at his request; and for money due on an account stated, which said sum of money so due to the defendant, exceeds the said sum of 23*l.*, parcel, &c., and all damages by the detention thereof; and out of which said sum so due, the defendant is ready and willing, and hereby offers to set off and allow the said sum of 23*l.*, parcel, &c., as aforesaid, and the said damages. Verification. Replication to the plea, so far as it relates to the sum of 23*l.*, that the defendant, of his own wrong, and without, &c., did not pay the said sum of 23*l.*, parcel, &c. &c. Demurrer to the replication, assigning for cause, that it did not sufficiently traverse or confess and avoid the plea; that it was inadmissible, as the plea did not consist of matter of excuse; that the consent of the plaintiff was improperly traversed with the sale; and that the plea claimed title to the 23*l.* The objections to the plea were, that it was inconsistent and contradictory, and amounted to the general issue.

Martin, in support of the demurrer. The plea is good, *Carr v. Hinchliff* (a). The debt to the plaintiff is extinguished by the counter debt. De injuriâ cannot be replied in an action of debt. It is admissible in assumpsit only where the plea sets up an excuse for the breach, as in *Isaac v. Farrar* (b), by shewing that the promise was without consideration, and other cases of this nature, which have been brought within the resolution in *Crogate's case* (c). The excuse precedes the breach; but an action of debt cannot, at the same time, admit the debt and excuse the non-payment. *Jones v. Senior* (d), *Elwell v. The Grand Junction Railway Company* (e). Secondly, the plea shews authority derived from the plaintiff, and claims an interest in the defendant. De injuriâ is inadmissible, *Crogate's case*.

(a) 4 B. & C. 547; 7 Dowl. & Ry. 42.

(b) 1 M. & W. 65.

(c) 8 Rep. 66.

(d) 4 M. & W. 123.

(e) 5 M. & W. 669.

Heaton for the plaintiff. The plea is contradictory. It alleges a sale by the plaintiff by the agency of Mason, and also a sale by Mason on his own account. It also amounts to the general issue, because in denying the breach in this form of action, it denies the debt. But as the plea professes to excuse the payment, and states a number of facts, constituting one defence, the plaintiff is entitled to put them in issue by this replication. *Noel v. Rich* (a), *Hebden v. Ruel* (b), *Warner v. M'Kay* (c).

1841.
PURCHELL
v.
SALTER.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court. This case was argued before us last Term. [His Lordship here stated the pleadings]. Objections of form to the plea are cured by pleading over, but all objections on matters of substance remain open to the plaintiff. The facts stated in this plea were considered to constitute a defence in *George v. Clagett* (d), and the cases there referred to in a note, and which have been since recognised in *Carr v. Hinchliff*. In *George v. Clagett*, the facts were given in evidence; the defence was set up under the general issue, but this was sometimes pleaded specially, as in *Carr v. Hinchliff*, where, on objection that the special plea amounted to the general issue, the Court held, that though the defence was available under the general issue, it might, nevertheless, be pleaded specially. As to the other objections raised in this case, they do not amount to any real objection either in form or substance. The plea being good, we must now consider the replication. In former times, the replication de injuriâ was allowed in trespass, replevin, defamation, and malicious prosecution, but it does not seem to have occurred in assumpsit on promises, or debt on simple contract; nor was it likely to occur in the latter actions, because the general issue, in those cases, would let in the whole of the defendant's case. In the old entries, we find no instance of the replication in assumpsit or debt on simple

(a) 2 C., M. & R. 360.

(b) 6 Scott, 442.

(c) 1 M. & W. 591.

(d) 7 T. R. 359.

1841.

PURCHELL

v.

SALTER.

contract, but since the new Rules special pleas have become more necessary, and no provision is made for the plaintiff to reply, so as to take separate issues on the different facts stated in the plea. But at the same time, if the facts amount to one entire defence, although the Court will not allow separate issues, yet they may be put in issue altogether, and the Court will permit the plaintiff to have a comprehensive form of replication. Doubts have arisen from time to time, whether this could be done in assumpsit or debt on simple contract, but after the best consideration we can give, we are of opinion, that if a plaintiff may reply that the defendant of his own wrong, and without the cause alleged, committed the trespass or the grievance as spoken or published in the libel, so the same principles of pleading may be extended to a reply, that the defendant broke his covenant or his promise, or refused to pay the debt; or that he broke the contract, if this form should be preferred, and in debt, omitting the words "of his own wrong;" that the defendant "without the cause alleged," refused to pay the debt. But if this compendious form of replication be allowed, the plaintiff must be confined within some limits. There are some exceptions stated in *Crogate's* case, and although this may not be thought to have any direct application to this form of action, yet if in consequence of a new practice in pleading, a new form of replication be engrafted on this action from others, it is most convenient to adopt the rules and decisions which have been made, so far as they are applicable to it. Before adverting to those decisions, we will again notice the case of *Carr v. Hinchliff*, where it was objected to the plea, that it imposed a hardship on the plaintiff, as it compelled him to admit one-half of the defendant's case. Mr. Justice *Bayley*, however, said, "supposing it to be so, that can not be adopted by the Court as a ground for saying that the plea is bad: but I am not prepared to say, that the plaintiff might not have framed his replication so as to put in issue both the sale by the factor and the debt stated to be due from him to the defendant

as alleged in the plea. Those two facts constitute one matter of defence, and the replication suggested might, probably, be supported by the cases of *Robinson v. Raley*, and *O'Brien v. Saxon*". But he did not, perhaps, intend to give any decided opinion. In *Robinson v. Raley* (a) there was a justification under a right of common; and the replication traversed that the cattle were the defendant's cattle, and that they were levant and couchant on the premises, and that they were commonable cattle. There was a special demurrer, and the Court held the replication good, because the several facts put in issue, constituted only a single proposition, viz. the measure of common. In *O'Brien v. Saxon* (b), which was an action for maliciously suing out a commission of bankrupt, the defendant pleaded that the plaintiff was a trader, and that he contracted a debt to the amount of 100*l.*, and became a bankrupt; to which the plaintiff replied *de injuriâ*. On demurrer, the Court held the replication good, because these facts, connected together, contained one entire proposition. These cases ran on the same principles of pleading as are laid down in *Crogate's* case. Several cases have occurred since the new Rules, either directly applicable, or where the general doctrines of this branch of pleading have been adverted to. *Hooker v. Nye* (c), *Solly v. Neish* (d), *Crisp v. Griffiths* (e), *Whittaker v. Mason* (f), *Griffin v. Yates* (g), *Isaac v. Farrar* (h), *Jones v. Senior* (i), *Watson v. Wilks* (j), *Hebden v. Ruel* (k), and *Elwell v. The Grand Junction Railway Company* (l). It is not necessary to state the particulars of these cases; the facts in this description of pleas are so much varied, that they do not furnish much room to argue from one to another: but the general conclusion from them is, that a

1841.
PURCHELL
v.
SALTER.

(a) 1 Burr. 316.

(b) 3 B. & C. 908; 4 Dowl. &

Ry. 579.

(c) 1 C., M. & R. 258.

(d) 2 C., M. & R. 355.

(e) 2 C., M. & R. 159.

(f) 2 Bing. N. C. 359; 2 Scott,
567.

(g) 2 Bing N. C. 579; 2 Scott,

845.

(h) 1 M. & W. 65.

(i) 4 M. & W. 123.

(j) 5 A. & E. 237; 6 Nev. &
Man. 752.

(k) 6 Scott, 442.

(l) 5 M. & W. 669.

1841.

PURCHELL
v.
SALTER.

plea or replication cannot be rejected as multifarious, if all the facts stated in the plea constitute one defence, for the rule of pleading is, not that the issue must be joined on a single fact, but a single point of defence. It must, however, be understood, that there must be nothing of title or interest in the plea, so as to fall within the exception in *Crogate's* case, but that the plea must consist of mere matter of excuse for non-performance; that it must not deny the promise, for that would be a bad special plea, and make the replication bad; nor must the plea amount to matter of discharge. These being the principles on which these pleadings are to be considered, let us now consider this particular replication. We have before noticed the approval of Mr. Justice *Bayley* of such a replication, if it should ever arise. In *Isaac v. Farrar*, Lord *Abinger* recognizes *Carr v. Hinchliff* with approbation. But as the question is raised before us on this demurrer, it is proper to examine whether the rules of pleading, which we have above stated, will govern this case. This replication is not multifarious, because the facts stated in the plea make but one defence, which the plaintiff puts in issue. The plea does not deny the plaintiff's title, though it details the circumstances under which the sale was made; nor does it amount to a discharge of the debt. Pleas in discharge are distinguishable from pleas in excuse; they bear on and apply to the debt itself, and put an end to it. Such are pleas of payment, accord and satisfaction, of a bond given for a simple contract debt, discharge before breach, and discharge under Bankrupt or Insolvent Debtors' Acts. All these pleas shew that the debt is gone, and if a debtor does not choose to avail himself of them, it is his own fault if he has to pay the debt twice over. But the plea in the present case is collateral to the debt; the having a set-off, is no discharge of the debt. The defendant says in effect, "I find the plaintiff owes me more money than I owe him, and I do not choose to pay this debt." He is not, however, bound to set off his debt against the plaintiff's debt, nor will he be in a worse situation by omitting to do so; he may pay the plaintiff, and

then sue him for his own debt; and he may have good reasons for preferring that course rather than set-off his debt. It is no bar until he makes his election, and when he elects to plead by way of set-off, although it is a bar to the action, it is not a plea in discharge. It is true that in *Carr v. Hinchliff*, some of the judges spoke of the plea as being one in discharge, by extinguishing the debt; but their attention was not drawn to the difference between pleas in excuse and pleas in discharge, and the question in that case was, not whether the plea was a plea in excuse. We are, therefore, of opinion, that this is a plea in excuse, and not a discharge. As to the two other objections, that the plea shews *authority* derived from the plaintiff, and also claims *title*, that is, an interest in, and right to retain, part of the debt; these objections which are taken from *Crogate's* case, are wholly inapplicable to the facts stated in this plea. Upon the whole, we are of opinion that the plea is good, and that the replication in answer is also good, and our judgment is for the plaintiff.

1841.
PURCHELL
v.
SALTER.

Judgment for the plaintiff (a).

(a) See *Bardons v. Selby*, 1 C. & M. 500.

— *See Case v. Munnings & M. H. Esq.*

CURREY and Another v. BOWKER.

CHARNOCK moved to set aside the issue, and all subsequent proceedings for irregularity, with costs. The irregularity complained of, was that the writ of summons was tested on the 8th of January, 1841, on which day it was served, and in the issue, it was described as dated the 23rd of December, 1840, contrary to the rules of H. T., 4 Wm. 4 (a), which required the true date of the writ to be inserted in the issue. The facts were these, the issue was delivered on the 13th of March, 1841, without any notice of trial; on the 16th of April, notice of trial was given, whereupon the defendant, who had previously conducted the proceedings in person, applied to an attorney. On in-

It is too late to object that the date of the writ is mis-described in the issue, after a delay from the 13th of March to the 16th of April, although during that period, the defendant, who was not an attorney, conducted his defence in person.

(a) *Ante*, vol. 2, p. 327.

1841.
 CURREY
 and Another
 v.
 BOWKER.

specting the issue, the error in stating the date of the writ of summons was discovered, and instructions were given to apply to the Court. On the evening of that day the attorney was taken ill, and died the following day, the 17th. On the 21st, defendant applied at the chambers of his attorney, and for the first time found the cause of the delay in making the application. In support of the application *Wright v. Perrers* (a) was cited, where the Court set aside the verdict, because the date of the writ of summons was incorrectly stated on the writ of trial.

COLERIDGE, J.—Applications to set aside proceedings for irregularity, (and there is clearly an irregularity in this case,) must be made according to the 33rd rule of H. T., 2 Wm. 4 (b), within a reasonable time, or before the party applying takes any fresh step with knowledge of the irregularity. Now it is true, that the defendant has taken no fresh step, and the time from the 16th of April to the present time, has been reasonably accounted for; but I think that the reason assigned by the defendant's counsel for the delay from the 13th of March to the 16th of April, *viz.*, that the defendant was conducting the defence in person, is not sufficient. If parties choose to conduct their own cases, they must submit to the same rules as other persons. The Court cannot make any distinction.

Rule refused.

(a) *Ante*, vol. 5, p. 463.

(b) *Ante*, vol. 1, p. 186.

REGINA v. The JUSTICES of WILTS.

(*Before the Four Judges.*)

Notice of an intended application for a certiorari to re-

RULE nisi for a certiorari to remove an order of the Quarter Sessions of the peace for Wiltshire, by which an order of justices in Quarter Sessions, made on the hearing of an appeal, stated the names of the appellant and of the respondent, and was signed by J. B., attorney for the respondents, and the notice was given to three justices, who were sworn to have been present at the trial and hearing of the appeal: *Held*, a sufficient notice under stat. 13 Geo. 2, c. 18, s. 5.

order of justices had been quashed on appeal. The order of sessions was signed "By the Court, S., clerk of the peace." The notice of the intended application for the writ, was as follows:—"I hereby give you notice, that at the expiration of six days next after the service of this notice, or as soon after as counsel can be heard, it is intended to move her Majesty's Court of Queen Bench, at Westminster, for a writ of certiorari, to be issued to remove the judgment, order, and all other proceedings had and taken at the general Quarter Sessions of, &c., in a certain matter of appeal against an account of C. S., E. E., C. J., and J. S., late churchwardens and overseers of the poor of the parish of Bradford, in the said county of Wilts, wherein T. S. was appellant, and the said C. S., E. E., C. J., and J. S. were respondents. Dated this 26th of October, 1839." (Signed) "J. B., attorney for the respondents." "To W. H. L. Bruges, John Ravenhill, and J. L. Phillips, Esqs., the Rev. E. J. Williams, clerk, and others, her Majesty's justices of the peace in and for the county of Wilts." Affidavit was made of service of this notice "on W. L. H. Bruges, J. L. Phillips, and J. Ravenhill, three of her Majesty's justices, &c. for the county of Wilts, and that they were present at the trial and hearing of the appeal."

1841.
 REGINA
 v.
 The Justices of
 Wilts.

Sir *F. Pollock* and *Archbold*, in shewing cause, objected, that under the 13 Geo. 3, c. 18, s. 5, this was not a sufficient proof of notice to the justices who made the order. It is consistent with this affidavit, that the justices who are named, may have taken no part in the proceedings, or may have quitted the Court before the judgment was pronounced. [Lord *Denman*, C. J.—It is sworn that they were present at the trial. The order is the act of the whole Court, and how could it be shewn that any individual justice took part in the order except by shewing his presence? The justices set forth the claim, and it is the deponent who reports their decision], Secondly, the notice is signed by the attorney for the respondents, but it is not stated that they are "the par-

1841.
 REGINA
 v.
 The Justices of
 WILTS.

ties suing forth the writ." [Lord *Denman*, C. J.—He signs the notice of the intended application as the attorney of the respondents, who are all named in the notice. In effect, he says that he intends to apply as their attorney].

PER CURIAM.

Rule absolute.

Ex parte BROWN.

Where a clerk is discharged from his articles, on the ground of his master's insanity, he must be articted to another attorney for the residue of the term of five years unelapsed at the time of the insanity commencing, and a portion of the time served after that event, with other attorneys carrying on the master's business, can not be reckoned.

KNOWLES applied, pursuant to 22 Geo. 2, c. 46, s. 9, on behalf of an articted clerk, that he might be discharged from his articles, and be at liberty to enter into fresh ones with another attorney, on account of the insanity of the gentleman to whom he was now articted. In the month of July, 1837, he was articted to a gentleman named Parkins, and from that time until the month of November, 1840, he regularly served Mr. Parkins. In the last-mentioned month, that gentleman unfortunately became insane. At first, another attorney carried on the business on account of Mr. Parkins, and under the gentleman so acting as agent to the master, the clerk continued to serve. Afterwards, the business was assigned to another person, who carried it on for his own profit. With this latter gentleman he served a further time. Mr. Parkins still continuing in a state of unsound mind, the present application became necessary, in order to execute new articles for the completion of the five years' service. The question was, whether the time which had been served with the gentleman who stood in the relation of an agent to Mr. Parkins, and afterwards with the assignee of the business of that gentleman, was to be reckoned in the period of five years, so that he need only be articted for the remainder of the five years, after deducting the period of service with Mr. Parkins, and the latter service already described; or,

whether that period could not be deducted, so that he must be articted for that period of the service which remained unexpired, when the insanity of the master commenced. It was submitted that the service under the two persons mentioned, after the master became insane, ought to be calculated, as, if the master had recovered after a time, and the clerk had continued in his service, the intermediate period would have been taken into the calculation.

1841.

Ex parte
BROWN.

COLERIDGE, J.—It cannot be said that the service since the master became insane, was service under the articles. But I will not say what might have been the effect of that service, if there had been an adoption of it by the master. Here, however, there was none. The clerk may be discharged from his articles, be at liberty to enter into fresh articles with another person for the remainder of the period of five years that had not elapsed in the month of November, 1840, when the master became insane.

Rule accordingly.

MITCHELL v. FOSTER.

(*Before the Four Judges.*)

TRESPASS for taking goods. Plea, not guilty. At the trial, at the Cambridge Spring Assizes, 1839, before *Tindal*, C. J., it appeared that the action was brought for the seizure of the plaintiff's goods under a conviction by two justices, (of whom the defendant was one), for an offence against the 4 & 5 Wm. 4, c. 51, s. 19, in having the words "licensed to deal in spirits" painted on his door without due authority. By this statute, the summons to appear and answer the information is required to be served "ten days at least" before

The 4 & 5 Wm. 4, c. 51, requires that a summons to appear before justices, and answer a summons under the statute, shall be served ten days "at least" before the hearing. A party was summoned on the

20th day of the month to appear on the 30th, and was convicted for default of appearance: *Held*, that the justices had no jurisdiction, as the ten days must be reckoned exclusive of the day of serving the summons, and that of convicting the defendant.

1841.
 MITCHELL
 v.
 FOSTER.

the time therein appointed for the hearing of the complaint. By the conviction it appeared, that the information had been laid on the 20th of September, and the plaintiff had been convicted, on default of appearance, on the 30th. The plaintiff had not appealed against the conviction. Verdict for the plaintiff, with 5*l*. damages, leave being given to the defendant to move to enter a nonsuit, if trespass was not the proper form of action. A rule nisi had been obtained accordingly.

Biggs Andrews now shewed cause, and cited *Ex parte Prangley* (a), and *Rex v. The Justices of Shropshire* (b), as authorities, that "ten days at least" must be counted as ten clear days exclusively of the day of giving the notice, and the day of the conviction. There was a total want of jurisdiction in the convicting justices, as the time allowed by the statute for appearing to the information had not expired on the 30th.

The Court then called upon

The *Attorney General* and *Storks*, Serjt., contra. By Reg. Gen., H. T., 2 Wm. 4, c. 8(c), unless the days are expressed to be "clear" days, the last day is not excluded. That has been the uniform mode of computation since that rule of Court.

LORD DENMAN, C. J.—A clear want of jurisdiction appears on the face of the conviction, as the time allowed for the plaintiff to attend and answer the complaint before the justices had not expired, according to our decision in *Rex v. The Justices of Shropshire*, from which we are not disposed to depart. Ten days "at least" must mean not less than ten days, according to any construction.

PATTESON, J.—The last decision of this Court, *Rex v. The Justices of Shropshire*, is in point, and it is better to

(a) 4 Ad. & Ell. 781.

(b) 8 Ad. & El. 173.

(c) *Ante*, vol. 1, p. 200.

adhere to the rule of construction as there laid down. The plaintiff was prematurely convicted in his absence.

1841.

MITCHELL

v.

FOSTER.

WILLIAMS, J.—The expiration of the time was necessary in this instance to give the justices jurisdiction.

Rule discharged. (a)

(a) See *Young v. Higgon*, ante, vol. 8, p. 212, where it was held, that in a notice of action against a magistrate, under 24 Geo. 2, c. 44, s. 1, the time must be computed exclusive, both of the day of giving notice and of bringing the action.

2 Cr. & L. 20. 2 L. Rep. 109.

PALMER v. BEALE and Another.

ERLE shewed cause against a rule nisi, obtained by *Barstow*, calling on the defendant to shew cause, why the nisi prius record, and all the earlier proceedings in the cause, should not be amended, by striking out the name of one of the defendants. It was an action on a charter-party, against the two defendants as owners. The cause went down for trial at the last assizes for Gloucester. It was then ascertained, that although the charter party had been entered into on the 22nd September, in the previous year, one of the defendants had not become registered owner until the 28th September. An application, previous to the cause being called on, was made to Mr. Justice *Erskine*, who was the judge presiding on the civil side, to amend, by striking out the name of the defendant who had thus been improperly joined. His lordship, however, refused to do so, and the record was accordingly withdrawn. The present rule was then obtained. *Erle* contended, that the application could not be allowed to succeed, as it was, in fact, sought to amend the writ, which the Court had no power to do. Wherever the Court had interfered to amend the writ, by allowing a new party to be introduced on the record, it was where the claim would be barred by the

Where a plaintiff has made too many persons defendants, the Court will, previous to trial, allow the name of one to be struck out of the proceedings, subsequent to the writ, on payment of costs, the remaining defendant being allowed to plead de novo.

1841.
 PALMER
 v.
 BEALE
 and Another.

Statute of Limitations. In the case of *Lakin v. Watson* (a), which was an action by executors, the defendant pleaded in abatement the non-joinder of another executor, who had not proved, the Court allowed the proceedings to be amended, on payment of costs, as the Statute of Limitations would have been a bar to a fresh action. There, Mr. Baron *Parke* said, "All the judges have come to the resolution that in future, since the Uniformity of Process Act, no amendment of this kind ought to be allowed, unless when the Statute of Limitations would be a bar, and that is to be the only exception." In *Cooper v. Whitehouse* (b), it was held, that if one sue several defendants in debt, and the evidence does not fix all the defendants, the plaintiff must be nonsuited, and the judge will not allow the declaration to be amended, by striking out the names of those defendants who are not affected by the evidence. In *Doe dem. Poole v. Errington* (c), it was held, that a count in ejectment, laying a joint demise by two, is not supported by proving the two to be entitled as tenants in common; the judge at Nisi Prius having refused, on this objection being taken, to amend the record by altering the demise, and the plaintiff having thereupon been nonsuited, the Court would not interfere with that discretion. Under these circumstances, the present rule must be discharged.

Barstow, in support of the rule, contended that the case of *Cooper v. Whitehouse* was one in which the application was made at Nisi Prius, whereas, here, the application was made before the cause came to be tried. It did not follow, that because the judge at Nisi Prius would not amend in the manner proposed, that, therefore, such an amendment could not be made previously. [*Coleridge, J.*—The difficulty which I find in considering the application is, that the judges have decided that they will not make such an amendment as is here prayed, except for the purpose of preventing the operation of the Statute of Limitations.]

(a) *Ante*, vol. 2, p. 633. (b) 6 C. & P. 545. (c) 1 Ad. & El. 750.

The determination in question of the judges only applied to amendment of the writ; such an amendment was not, however, necessary in the present case. It was sufficient to amend the issue. No injury whatever could arise to the defendant by such an amendment being made, although great expense and inconvenience must result to the plaintiff from the application not being granted.

1841.
PALMER
v.
BEALE
and Another

COLERIDGE, J.—By 1 Reg. Gen., M. T., 3 Wm. 4 (a), it is ordered, “That every writ of summons, capias, and detainer shall contain the names of all the defendants, (if more than one), in the action, and shall not contain the name or names of any defendants in more actions than one.” In *Coldwell v. Blake* (b), the Court of Exchequer held, that in a writ against several, the plaintiff may declare against one only; but if he declare against any other defendant afterwards, he will be irregular. The Court then expressed an opinion, that the objection did not appear, until the plaintiff came to declare against the second defendant. On the authority of that case, I think that the present rule may be made absolute for the amendment of all the proceedings, except the writ, on payment of all the costs of both the defendants, the defendant who remains on the record being at liberty to plead afresh.

Rule absolute accordingly.

(a) *Ante*, vol. 1, p. 470.

(b) *Ante*, vol. 3, p. 656.

LAMB v. MICKLETHWAITE.

(*Before the Four Judges.*)

DEBT for goods sold and delivered. Pleas, nunquam indebitatus, and payment. The goods consisted chiefly of demand, as among the payments for which he gave credit, an article, which, in fact, had not been paid for, but returned: *Held*, that the judge rightly left it to the jury to say whether, in fact, the balance of the whole account was or not in the plaintiff's favour.

A plaintiff erroneously inserted in the particulars of

1841.

LAMB
v.
MICKLE-
THWAITE.

articles of plate. A bill of particulars had been delivered in the usual manner, shewing a delivery of goods to the amount of 949*l.* 10*s.* On the credit side of the account a great many payments were entered, and their whole amount was stated at 920*l.* 10*s.* The action was brought for the balance. But in addition to these payments, and on the same side of the account, was an entry of 84*l.* 16*s.*, being the value of a silver tea urn which had been returned. At the trial of the cause, before Lord *Denman*, C. J., at the London Sittings after last Hilary Term, these particulars of demand were put in evidence, and *Bayley*, for the defendant, then insisted, that on his own shewing, the plaintiff had no ground of action, for that there being but a balance of 29*l.* in favour of the plaintiff on the money account, that balance was more than covered by the value of the tea urn. The jury, however, on being asked whether, in fact, they believed that there was a balance in favour of the plaintiff, answered, that there was, and found a verdict for that amount in his favour.

Bayley now moved to set aside this verdict, and for a new trial. In the case of *Kenyon v. Wakes* (a), the Court of Exchequer refused to set aside a verdict given for a defendant, where the plaintiff had gone for a balance of the arrears of a salary of 15*s.* per week, and where the particulars shewing payment of half the amount, the jury had negatived the claim for more. The Court there proceeded on the principle that the plaintiff must be bound by his particulars. And that case was the stronger, as there, no plea of payment was on the record. And in *Eastwick v. Harman* (b), that Court held, that where a plaintiff, by his particulars of demand, after giving credit for sums paid, claims a balance only, the plea of payment must be considered as pleaded to that balance, though some of the items for which credit is given, were paid for, after action brought (c).

(a) *Ante*, vol. 6, p. 105; 2 Mee. & W. 13.
& Wels. 764.

(b) *Ante*, vol. 8, p. 399; 6 Mee. *ante*, vol. 8, p. 375.

(c) But see *Bosley v. Moore*,

The principle of both these cases was the same, that the plaintiff must not be allowed to contradict his own particulars.

PATTERSON, J.—I do not see any doubt in the case. The right of action accrues upon the delivery of the goods. It appears that the original bill was for 949*l*. 10*s.*, it was subsequently reduced, by payments made at various times, to a sum of 920*l*. 10*s.* For the difference between that sum and the amount of the original demand, I am of opinion that the plaintiff is entitled to recover, notwithstanding the mistake in his particulars. The amount of an article which was in fact returned, but not paid for, though erroneously placed among the payments on the credit side of the account, cannot be held to be binding on the plaintiff. The finding of the jury is conclusive on the fact.

PER CURIAM.

Rule refused.

HOARE and Others v. ROBINSON.

F. ROBINSON shewed cause against a rule nisi, obtained by *Crompton*, to set aside a judgment, and all subsequent proceedings, on the ground that no notice of declaration had been served on the defendant, with costs. It was an action to recover the amount of a certain sum, the price of a quantity of beer, supplied by the plaintiffs to the defendant. The action was commenced by writ of summons, and in the writ, the defendant was described as of Fleet Street, Liverpool; that was his office in which he carried on his business, and to which he referred all inquirers; in that office, he was always seen by the plaintiffs' traveller; there, orders were sent to him and letters directed to him. His place of residence was Lime Kiln Lane, Tranmere, but this was unknown to the plaintiffs. When it was sought to serve him with the writ, he was personally served near his office, he stating his name to be

Where a defendant is served personally with a writ of summons at his place of business, and he does not make any mention of a place of residence, different from his place of business, the plaintiff may serve notice of declaration there afterwards.

1841.

LAMB

v.

MICKLE-
THWAITE.

1841.
HOARE
and Others
v.
ROBINSON.

Robinson, and that the place of which he was described in the writ was his office. No appearance was entered by the defendant, and, therefore, one was entered for him by the plaintiffs, and a declaration filed. A notice of declaration was left with the clerk of the defendant, named Buckmaster, at the office where the defendant was served, and that person was requested to give it to the defendant. This, he promised to do. The defendant did not plead, and judgment by default was accordingly signed, and the defendant taken in execution. The present application was founded on an affidavit made by the defendant, stating, that the notice of declaration had never come to his hands. No affidavit was made by Buckmaster. The objection to the service of the notice of declaration was, that it was left at the defendant's place of business, instead of his place of abode. It was submitted, that for the purpose of the service of this writ, the defendant's place of abode must be considered as that where the service was effected. It was the place of which he was described in the writ of summons, and if he objected to that description, he should have moved to set aside the writ. In *Haslope v. Thorne (a)*, it was held, that in an affidavit of debt, a clerk of a ship-insurance agent might describe his place of abode to be the office, where he was employed the greater part of the day, though at night he slept at another place; and in *Yardley v. Jones (b)*, it was held, that an attorney's place of business is the proper residence of which to describe him. The place at which the notice of declaration was served must consequently be considered as the proper one.

Crompton supported the rule, and contended, that as the practice had always been to serve the notice of declaration at the place of abode, and not the place of business, the question was, whether that practice was in this case to be laid aside? The two cases cited were distinguishable from the present. The former was merely the case of a

(a) 1 Mau. & Sel. 103.

(b) *Ante*, vol. 4, p. 45.

person describing himself as of a particular place, where he carried on his master's business during the greater part of the day; the other was the case of an indorsement of an attorney's residence on a writ of summons. It was quite consistent and proper that the place of business should be that of which the party in question was described. That was, however, very different from the place at which a defendant in a cause ought to be served with the proceedings in it. As to the observation, that the defendant might have objected to the manner in which he was described in the writ of summons, that was not competent for him to do. By 2 Wm. 4, c. 39, s. 1, (the Uniformity of Process Act), it was provided, that in the writ of summons, and every copy thereof, "the place and county of the residence, or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned." Of whatever residence the defendant was described, that must depend on the state of the plaintiff's knowledge; a wrong description of his place of residence would afford no ground of objection to the process. The rule of 1 Reg. Gen., H. T., 2 Wm. 4, s. 49 (a), was an authority to shew the strictness with which the defendant's residence was required to be considered in serving a notice of declaration. By that rule, it was ordered, that "where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the Court." This was an additional reason for holding that the notice of declaration ought to have been served at the defendant's place of residence, and not at his place of business.

1841.
 HOARE
 and Others
 v.
 ROBINSON.

Cur. adv. vult.

COLERIDGE, J.—This was an application to set aside a judgment, on the ground that no notice of the declaration

(a) *Ante*, vol. 1, p. 189.

1841.
HOARE
and Others
v.
ROBINSON.

had been served on the defendant. He was stated to have been living at Tranmere, in Cheshire, but that his office of business is in Fleet Street, Liverpool, and he was described in the writ of summons as of Fleet Street, Liverpool. The service was effected in this way: the person serving the writ went to Fleet Street, Liverpool, and asked of a person he met casually, for the defendant's house, when the defendant said, "that is my name, and there is my office," whereupon he was served with the writ. An appearance was afterwards entered for the defendant by the plaintiff, and a declaration was filed, and notice of the declaration was taken to the defendant's office in Liverpool, and left there with his clerk, Buckmaster, who was requested to deliver it over to the defendant, and the clerk said it should be done. Now, the ground of the present application is, that that notice never reached the defendant, and this is an objection of the very strictest kind, because the defendant received the process and made no objection to the description given of him. It is true, that under the Uniformity of Process Act, it is sufficient if a defendant is described in a writ of summons, either of his actual residence or supposed residence, and that the defendant could not, therefore, have made any motion to set aside the writ for the misdescription; but then, by his silence, he has assisted to deceive the plaintiff, and it was, therefore, natural to serve the notice of declaration at the place of which the defendant was described. Now, it is to be observed, that the defendant's clerk, to whom the notice was delivered, makes no affidavit on this rule; and I cannot understand why he does not do so, if the transaction has been honest. If the clerk had lost the notice, or done anything else with it, there would no doubt have been an affidavit made to that effect. The absence of any affidavit by the clerk, raises so strong a suspicion in my mind that the defendant is swearing by the card, that I am not disposed to make this rule absolute, and, therefore, it must be discharged. If the defendant

wishes to be let in to try the cause, he can make an application, on an affidavit of merits, to set aside the judgment.

Rule discharged (a).

(a) See *Rolfe v. Brown*, ante, vol. 3, p. 628.

1841.

HOARE
and Others

v.
ROBINSON.

MURRAY v. BOUCHER.

(Before the Four Judges.)

SIR W. FOLLETT moved for a rule to set aside an order made by *Wightman*, J., for striking out a plea. This was an action on a guarantee. The plaintiff was to advance money on the security of certain shares in the Anthracite Coal Company, and the defendant guaranteed him the repayment of such advances, "in case the shares did not make up the sum due." The declaration contained an allegation that the shares were of no value, and the plea which had been struck out traversed that allegation. The object of the parties was, to raise the question, whether the plaintiff could sue the defendant, under the terms of this guarantee, before he had in the first instance disposed of the shares. The defendant intended to insist that the shares must first be disposed of, and that he was only liable for the balance.

A. guaranteed to B. the payment of a sum of money advanced on certain shares in a Company, "in case the shares should not make up the sum due." In an action on the guarantee, the declaration alleged that the shares were of no value. The defendant by his plea, traversed that allegation: *Held*, that a judge at Chambers rightly struck out the plea as tending an issue, that was not material to the question in dispute between the parties.

WIGHTMAN, J.—The plea which I struck out would not have raised the question, and I struck it out because, had issue been taken on it, a finding that the shares were of the value of one farthing, would have entitled the defendant to the verdict. I did not think that that would meet the justice of the case.

Sir W. Follett. The defendant was bound by the terms of the declaration, which he traversed. He was entitled to traverse the allegation as he found it.

1841.

MURRAY

v.

BOUCHER.

Per CURIAM.—The judge has rightly exercised his discretion. The issue raised by the plea would not put in issue the real question between the parties.

Rule refused.

In the Matter of Arbitration between WOODCROFT
and JONES.

A clause in a partnership deed, authorizing a reference in case of disputes between the partners, and the making the "award" of the arbitrator, instead of the "submission" a rule of Court, if it does not appear that "award" was used by mistake for "submission," is not within the meaning of the 8 & 9 Wm. 3, c. 15, s. 1, and, therefore, a judge has no power to order witnesses to attend an arbitrator acting in such a matter.

Where there did not appear to have been any misconduct on the part of the parties or arbitrators, the Court refused to direct a submission to arbitration to be revoked.

KELLY shewed cause against a rule nisi, obtained by Sir *William Follett*, calling on Woodcroft to shew cause why leave should not be given to revoke the submission to arbitration, if any had been made, and why the order of Mr. Justice *Cole-ridge*, requiring the attendance of certain witnesses, should not be set aside. It appeared that Messrs. Woodcroft and Jones had, by deed dated 15th of May, 1834, entered into partnership for a period of seven years, to be computed from the 31st of July, 1840. The deed contained a clause, "That if any doubt, difference, cause of suit, or dispute should arise at any time or times thereafter between the said parties, their executors or administrators, or any of them, touching the consideration of these presents, or any clause, matter, or thing herein contained, or the said co-partnership, trade, or business (and such doubt, or difference, or dispute should not be fully decided between themselves within fourteen days after the same should arise), then that, on the request of either, it should be reduced to writing, and referred to arbitration." Clauses were then introduced for appointing an arbitrator, and also a provision made, "That for the further and better enforcing of every such *award*, the same shall from time to time be made a rule of the Court of King's Bench according to the direction of the statute in that case made and provided." The partnership terminated at the end of July, 1840. On proceeding to settle their affairs, it was found that certain disputes arose con-

cerning the partnership accounts, and Woodcroft accordingly had them reduced into writing, and on the 5th of August, sent them to Jones, requiring his consent to their being submitted to arbitration pursuant to the deed. This he refused, and would not take any step in the matter towards the final adjustment of the dispute. At the instance of Woodcroft, however, arbitrators were appointed to determine the disputes, and they made a peremptory appointment for the 29th of October to proceed with the reference. An order was obtained by Woodcroft from Mr. Justice *Coleridge*, requiring the attendance of certain witnesses before the arbitrators. On the 15th of August, 1840, Jones filed a bill for an account in the Court of Chancery, and for the final settlement of the partnership affairs. On the 17th, Woodcroft was served with a subpoena to appear to the bill. Proceedings were still pending, and a receiver appointed. On this state of facts, the present application was made for leave to revoke the submission to the arbitrators, and to rescind Mr. Justice *Coleridge's* order for the attendance of the witnesses before the arbitrator. *Kelly* now contended, that with respect to the first branch of the rule, there was no ground for revoking the submission to arbitration. With respect to the second branch of the rule, there was as little ground for granting it, as, the order of Mr. Justice *Coleridge* was perfectly legal and regular. Although the word in the deed describing the instrument to be made a rule of this Court was "award," and not "submission;" it was perfectly clear that the intention of the parties was that the "submission" should be made a rule of Court. In *Pedley v. Westmacott* (a), it was held, that the Court has jurisdiction in case of an award under the 8 & 9 Wm. 3, c. 15, though the submission bond was to make the *award* instead of the *submission* a rule of Court. That case proceeded on the authority of a manuscript case of *Powell v. Phillips*,

1841.
 In the matter of
 WOODCROFT
 and
 JONES.

(a) 3 East, 603.

1841.
 In the matter of
 WOODCROFT
 and
 JONES.

which was to the same effect. The only objection to the order which could be made, was that the learned judge had not jurisdiction for that purpose, but the cases cited clearly shewed that he had. The rule ought, consequently, to be discharged.

Sir *William Follett* supported the rule, and contended, on the first part of the rule, that as there were now grounds pending with respect to these very matters in dispute before a Court of Equity, it would be exceedingly inconvenient that two litigations should be proceeding at the same time on the same subject. As to the second part of the rule, the deed of partnership only authorizing an "award" to be made a rule of Court, the case did not come within the meaning of the 8 & 9 Wm. 3, c. 15, s. 1, which only applied to "submissions." In *Harrison v. Grundy* (a), the Court decided, that they could not receive any complaint to set aside an award until the submission was made a rule of Court, and that a consent in the submission bond to make the *award* a rule of the Court instead of the *submission*, would not warrant their interposing. That was a direct authority on the point. In the cases cited on the other side, the intention of the parties evidently was, that the submission should be made a rule of Court, although the word "award" was used. As the words of the statute were not pursued, and no intention to make the submission a rule of Court instead of the award could be collected, the learned judge who made the order for the attendance of witnesses, had no jurisdiction for that purpose.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for leave to revoke the submission to arbitration, if any such had been made, and for the rescinding an order made by me for the attendance

(a) 2 Str. 1178.

of certain witnesses before the arbitrators. The rule was moved in this form, because it was contended, that there had been no submission within the 8 & 9 Wm. 3, c. 15. It is necessary, however, in considering the first part of the application to treat the submission as made within that statute, because, unless it is, it seems clear that it is not within the 3 & 4 Wm. 4, c. 42, s. 39, and if so, there would be no necessity for any permission to revoke. Making this assumption, and looking only to the facts of the case, I can see no reason for allowing the revocation. It is not averred, that the opposite party has in any way misconducted himself in any matter connected with the reference, or that he has not correctly pursued the provisions of the deed which contains the covenant to refer, nor is it alleged, that according to those provisions, the arbitrators have not been duly appointed, or in any way behaved amiss. Inconveniences indeed are stated, and that the applicant has filed his bill in equity concurrently with his opponent's proceeding on the clause of reference in the partnership deed. But assuming that clause to be valid, I cannot but see that the inconveniences alleged are attributable to the applicant's own wrongful breach of it, and I must not deprive the other party of the benefit of that clause on account of inconveniences so produced, or because the applicant has chosen to file a bill instead of abiding by it. This part of the rule, therefore, might thus be disposed of. If there is no submission, leave to revoke will be nugatory ; if there is, the leave ought not to be given. But in order to determine on the latter part of the rule, it is necessary to decide whether there is a valid submission on the two statutes. Because the order for the attendance of witnesses ought not to have been made, unless the case is within them. And although it does not appear clearly that any of the witnesses made the present application, it is not fitting to leave it in uncertainty whether the order ought to be obeyed by them or not. The question arises under the following circumstances, Jones and Wood-

1841.

In the matter of
WOODCROFT
and
JONES.

1841.
In the matter of
WOODCROFT
and
JONES.

croft enter into partnership by deed, for a term which expired by effluxion of time on the 31st of July, 1840. The deed contains a clause of reference in these words, "If any doubt, difference, cause of suit, or dispute should arise at any time or times thereafter between them, their executors, &c., touching the construction of these presents, or any clause, matter, or thing therein contained, or the said co-partnership trade, or business." The deed then goes on to prescribe the course to be pursued in the statement of matters of difference, the appointment of arbitrators, and other matters down to the making of the award, and then proceeds thus, "And for the further and better enforcing the observance of *every such award*, the *same* shall *from time to time* be made a rule of the Court of King's Bench, according to the direction of the statute in that case made and provided." It was contended, that the statutes only applied to agreements containing a stipulation that the *submission* should be made a rule of Court, and although it was not disputed that an agreement to make the *award* a rule of Court instead of the submission, had been held to warrant the interposition of the Court; those, it was said, were cases in which the Court had seen that the word "award" had been used by mistake for "submission," and that the parties had intended to make the "submission" a rule of Court. But that in this case, the parties had really intended only what they had expressed, namely, to make the award a rule of Court, that this was shewn by the language of the deed speaking of "*every such award*" being "*from time to time*" made a rule of Court. It certainly appears, that the parties contemplated the possibility of several differences and several arbitrations occurring in the course of the partnership. The framer of the deed probably thought that awards might be made rules of Court, but it is difficult to suppose that there could have been an intention of making the whole deed a rule of Court, which, as it embraces many objects, there might be frequent need of, and which, even with reference to the arbitration clause,

the parties must be taken to have thought that they might, on more than one occasion, require to be possessed of. But if there was no intention to make the submission a rule of Court, and the words of the clause are to be understood literally, it appears to me, that the statute of Wm. 3, does not extend to it. The object of that statute was to effectuate the agreement of parties to refer, by giving them the authority of the Court. If then the agreement becomes the rule of Court, the authority of the Court cannot be pledged to enforce anything which the parties have not previously agreed to. The award must be tried by the rule, and unless it squares with it, obedience cannot be summarily enforced. But if the award becomes the rule of the Court, the Court may be called on to enforce something which the previous agreement of the parties has not sanctioned. The statute enacts, that the rule of Court shall be made simply upon reading and filing an affidavit of the witnesses to the agreement; and this is quite proper where that is made the rule, about which there can be no dispute, and which is to give the limit to the proceedings of the arbitrator, but which can never be itself brought into question. If, however, the award is to be made the rule of Court, that could not properly be done until its accordancy with the submission had first been established. It could not, therefore, be done ex parte, upon this ground, and without entering upon other considerations, I think this case not within the statutes, and that the order for the attendance of witnesses ought to be rescinded; to this extent the rule will be absolute.

1841.

In the matter of
WOODCROFT
and
JONES.

Rule accordingly.

1841.

WILLIAMS v. BURGESS.

(Before the Four Judges.)

Under the 3 Geo. 4, c. 39, s. 1, which requires that every warrant of attorney, to confess judgment, shall be filed "within twenty-one days after the execution," a warrant executed on the 9th day of the month, may be filed on the 30th.

TRESPASS for taking goods. At the trial, before *Cole-ridge*, J., at the Summer Assizes at Bristol, 1840, the principal question was, whether a warrant of attorney to confess judgment, &c., which was executed on the 9th, and filed on the 30th of the same month, was filed "within twenty-one days after the execution," within the meaning of stat. 3 Geo. 4, c. 39, s. 1? Verdict for plaintiff, subject to a motion to reduce the damages, if the warrant was not filed in due time.

Bompas, Serjt., now moved accordingly. The warrant could not be filed after the 29th. Where the computation of time is to be made from an act done, as in this instance, from the execution, the day on which it takes place is included. *Castle v. Burditt* (a), *Glassington v. Rawlins* (b). Sir *W. Grant*, in *Lester v. Garland* (c), held that to be the right computation, where the act to be done is one to which the party against whom the time runs is privy. The authorities were reviewed in *Blunt v. Heslop* (d), and the language of this Court favours that construction. The case of *Ex parte Fallon* (e), was decided under the Annuity Act, 17 Geo. 3, c. 26, the language of which is different.

LORD DENMAN, C. J.—The question in this case has been decided in *Ex parte Falcon*, which is an unquestionable authority. The Annuity Act requires a deed to be enrolled "within twenty days of the execution;" and by the 3 Geo. 4, c. 39, this warrant must be filed "within twenty-one days after the execution." There is no distinction

(a) 3 T. R. 623.

(b) 3 East, 407.

(c) 15 Ves. 248.

(d) 8 Ad. & Ell. 577; 3 Nev. & Per. 553.

(e) 5 T. R. 283.

between those expressions, and we ought not to encourage a doubt by granting a rule.

1841.

WILLIAMS
v.
BURGESS.

LITTLEDALE, J.—The case of *Ex parte Fallon*, which was decided on an expression perfectly synonymous in the Annuity Act, is a direct authority. It is doubtful if the case alluded to in 2 *Inst.* by Mr. Justice *Buller* was in point.

Rule refused (a).

(a) See *Young v. Higgon*, *ante*, vol. 8, p. 212.

FISHER v. LEDIARD.

W. ALEXANDER shewed cause against a rule nisi, for not proceeding to trial, according to the course and practice of the Court. It appeared, from the affidavit on which the rule was founded, that after issue was joined, the plaintiff not having duly proceeded to trial, an application was made for a rule nisi for judgment, as in case of a nonsuit. After this rule was obtained, and served on the plaintiff's attorney, it was agreed by the latter that the plaintiff should proceed to trial at the next assizes, and that if he did not, the defendant should be at liberty to move for judgment absolute, as in case of a nonsuit, in the same manner as if a peremptory undertaking had been given. The plaintiff did not proceed to trial at the appointed assizes, and the present rule was then obtained. The answer to the application was, that the plaintiff had learned, since the commencement of the suit, that the defendant was insolvent. It was, therefore, suggested that this was a proper case for a *stet processus*.

In order to discharge a rule for judgment as in case of a nonsuit, on the ground of the defendant's insolvency, it must appear on the plaintiff's affidavit, that the knowledge of the insolvency reached the plaintiff since the last step taken by him towards bringing the cause to trial.

Gray, in support of the rule, contended, that the affidavit produced in answer to the rule was insufficient, as it did not shew at what time the fact of the defendant's insolvency came to the knowledge of the plaintiff. In the case of

1841.

FISHER

v.

LEDIARD.

Mann v. Williamson (a), where the plaintiff's knowledge of the defendant's insolvency was acquired after the declaration was filed, it was held to be an insufficient answer to the motion for judgment, as in case of a nonsuit, as it ought to have appeared that the knowledge was not acquired until after issue was joined.

COLERIDGE, J.—I think that when the plaintiff seeks to relieve himself from the necessity of going to trial, on the ground of the defendant's insolvency, it must appear that the knowledge of that insolvency came to him subsequent to the last step taken by him. He has no right to bring an action against the defendant to vex and harass him, proceed with it to a certain extent, and then capriciously leave off. It is, therefore, essential to shew at what time the knowledge came to him. If he does not, it must be assumed that he had knowledge of the insolvency before taking the last step. On this ground, this rule might be disposed of; but it seems to me, from the facts as disclosed in the affidavit, that all his knowledge had come to him before what may be called a peremptory undertaking was given. I think the plaintiff ought to give a peremptory undertaking.

Rule discharged, on a peremptory undertaking.

(a) *Ante*, vol. 8, p. 859.

NEWMAN v. HICKMAN.

Where appointments are made for the purpose of obtaining a distringas, it is necessary that the hour should be mentioned, although there may be some reason to believe that the defendant is keeping out of the way.

WARREN moved for a distringas. The affidavit on which the application was founded, stated that the deponent had called on three different occasions at the house of the defendant, for the purpose of effecting a service of the writ of summons. On each occasion, the wife of the defendant was seen, and she stated that her husband was from home, and could not be seen. On the last occasion, when the

copy of the writ of summons was left with her, she was requested to give it to her husband. Her answer was, that she would put it in the fire and not shew it him, or tell him anything about it. The two last calls were made pursuant to appointments, but no hour was mentioned at which the deponent would call. He cited *Johnson v. Disney* (a), where it was held, that the hour of the appointment should be mentioned, unless the facts of the case shewed that the defendant was endeavouring to avoid being served. That decision shewed, that if it appeared that the defendant was keeping out of the way to avoid being served, the necessity for mentioning the hour was obviated. Here, it was evident that the defendant was keeping out of the way to avoid being served, and, therefore, no necessity existed for the affidavit to shew that the hour of appointment had been mentioned. The cases of *Gale v. Winks* (b), and *Webb v. Jenkins* (c), shewed that the Court did not in all cases require the strict rule of practice to be pursued, where the facts of the case shewed that the defendant was wilfully avoiding the service of process. (d)

1841.
 {
 NEWMAN
 v.
 HICKMAN.

WIGHTMAN, J.—The hour not being appointed, it seems to me, rendered it no appointment at all. The practice has always been to name the hour. This case, is different from that of *Johnson v. Disney*. The more modern practice has certainly been, I understand, to require the hour as well as the day to be mentioned. It is better to have one uniform rule.

Distringas refused.

(a) *Ante*, vol. 2. p. 400.

(b) *Ante*, vol. 5, p. 348.

(c) *Ante*, vol. 7. p. 135.

(d) See *Hickman v. Dallimore*,
ante, vol. 4, p. 278.

1841.

Doe dem. POWELL v. ROE.

On an application for judgment against the casual ejector, where proceedings under the 4 Geo. 2, c. 28, have been taken, it is not sufficient to shew that there is no sufficient distress "to countervail the arrears of rent," if more than half-a-year's rent is sworn to be due.

BALL moved for judgment against the casual ejector. Proceedings had been taken pursuant to 4 Geo. 2, c. 28, half a-year's rent being in arrear. The affidavit on which the application was founded, stated that a *year's* rent was in arrear, that there was "no sufficient distress to be found on the premises to countervail the arrears of rent."

COLERIDGE, J.—That is not sufficient, as there may be a sufficient distress on the premises to countervail *half a-year's* rent, although there is not sufficient to countervail a-year's rent. Suppose five year's rent was due, the landlord is not to avail himself of the statute merely because there is not a sufficient amount of property to countervail the arrears to that extent. A landlord has no right to lie by for such a length of time, and then seek thus to render the provisions of this statute available.

Rule refused.

REGINA v. QUAYLE.

(*Before the Four Judges.*)

After a rule for a quo warranto information has been made absolute, the Court will change the relator, on motion on his behalf, if by reason of his necessary absence from England, in the conduct of his own private affairs, he is unable to enter into the recognizance required by the 4 & 5 W. & M. c. 18, s. 2.

A RULE for a quo warranto, calling on the defendant to shew cause by what authority he exercised the office of town councillor of the borough of Liverpool, had been made absolute in Michaelmas Term, 1840, at the instance and on the affidavit of Francis Shand, as relator, made in pursuance of Reg. Gen., M. T. 3 Vict. 1839. The defendant had been elected to the office in November, 1839, and the affidavit of Shand was sworn in the same month.

he is unable to enter into the recognizance required by the 4 & 5 W. & M. c. 18, s. 2.

Sir *W. W. Follett*, in Hilary Term, 1841, had obtained a rule nisi to substitute Alexander Shand as relator, in the place of Francis Shand, on the ground stated in the affidavit, that Francis Shand had proceeded to Antigua in February, 1840, his presence being necessary to superintend his commercial affairs in that island; that it was his intention to return to England, but that the period of his return was uncertain, and that in consequence of his absence, he could not, as relator, enter into the recognizance required by the 4 & 5 W. & M. 4, c. 18, s. 2.

1841.

REGINA
v.
QUAYLE.

The Attorney General and *Crompton* now shewed cause. This application, on the part of the prosecution, is wholly without precedent; in *R. v. Latham*, cited in a note to *R. v. Wynne* (a), the charge of relator was made at the instance of the defendant. It is a new proceeding after the expiration of twelve months from the motion for the writ, and after the rule has been made absolute. The voyage to Antigua was not stated to have been unforeseen or unexpected by Francis Shand, and the time of his return is left in doubt. His inability to enter into the recognizance has been caused by his own voluntary act. }

Sir *W. W. Follett* and *Henderson* contra were not called upon by the Court.

LORD DENMAN, C. J.—No improper motives in making this application are suggested, nor is the power of the Court to charge the relator disputed. The grounds of objection do not seem to be sufficient. The new relator must be made liable to the same extent as the former relator; and, if necessary, this must be done by a rule.

The rest of the Court concurring.

Rule absolute.

(a) 2 M. & S. 346.

1841.

GLADWIN v. CHILCOTE.

In order to justify an arbitrator proceeding ex parte, a very strong case must be shewn of wilful delay by the party not attending; and, therefore, if a reasonable excuse for his not attending is shewn, the Court will set aside an award made pursuant to such a proceeding.

The Court will not, on disposing of a rule for setting aside an award on that ground, decide the question whether the party, against whom the award is made, shall pay the costs arising from his delay; but a separate motion for that purpose must be made.

GURNEY shewed cause against a rule nisi, obtained by *O'Malley*, calling on the plaintiff to shew cause why the award, made in this case in favour of the plaintiff, should not be set aside on the ground, among others, that the arbitrator had proceeded ex parte in the absence of the defendant. It was an action against an attorney for negligence, and a verdict was taken in favour of the plaintiff, subject to a reference. A notice of a meeting was given to the defendant for the 9th of July. He did not, however, attend. He afterwards stated that the counsel whom he had engaged, was absent from town, and, consequently, could not attend. It was sworn, however, in answer to this statement, that inquiries had been made at the Chambers of the counsel in question, and he stated that he had not been spoken to on the subject. Nothing was done at this meeting. On the 8th of August, notice was given by the arbitrator to the defendant of a meeting to be held on the 12th, and that notice was marked "peremptory." When this notice was served on the defendant, he stated to the person serving it, that he should not attend, but gave no reason to that person why he should not attend. He sent a letter, however, to the arbitrator, stating his reasons. Among those reasons was, first, the shortness of the notice, and, secondly, that he did not wish to proceed with the matter during the long vacation. He accordingly did not attend the meeting, and the arbitrator did nothing. A notice was then given by the arbitrator, on the 13th of August, for the 14th of September. That notice was not marked peremptory, nor did it state that the arbitrator would proceed in the absence of the defendant, if he did not attend. The plaintiff's attorney, however, at the time of serving the notice of this meeting, stated to the defendant that he should require the arbitrator to proceed ex parte, if the defendant did not attend. At that meeting, on the 14th of September, the defendant

did not attend, and no reason was assigned for his neglect. The arbitrator then proceeded *ex parte*, and heard the plaintiff's evidence. No subsequent meeting took place, and on the 26th of September, the arbitrator made his award. During the whole period, from the time of the trial to the last meeting, the defendant was frequently requested to mention some day when it would be convenient for him to attend, but he always avoided naming any day. *Gurney* contended, that the only question for the consideration of the Court was, whether the facts disclosed in these affidavits, justified the arbitrator in proceeding *ex parte*? He submitted that they did. The reason assigned by the defendant for not attending the first meeting, was false; for not attending the second, was insufficient; and none at all was stated for not attending the third. Under these circumstances, the arbitrator must be considered as clearly justified in so proceeding. No ground, therefore, existed for setting aside the award so made.

1841.
GLADWIN
v.
CHILCOTE.

O'Malley supported the rule. No doubt, under certain special circumstances, an arbitrator might proceed with a reference *ex parte*, but those which existed in the present case, were not of that description. The notice for the last meeting was not marked peremptory, nor did it intimate to the defendant that the arbitrator would proceed *ex parte*, if he did not attend. The notice for the previous meeting had been so marked, but which had the effect of deceiving the defendant. The case of *Dodington v. Hudson* (a) shewed that such a notice as the one given for the last meeting, was insufficient, and, therefore, the award made under such circumstances could not be sustained.

COLERIDGE, J.—This case is put chiefly on the ground, that the arbitrator has proceeded with the reference *ex parte*, and without the defendant having notice that he

(a) 1 Bing. 384.

1841.
GLADWIN
v.
CHILCOTE.

should so proceed. I should be sorry to lay down a rule, that in no case may an arbitrator proceed *ex parte*, and in the absence of one of the parties; for undoubtedly it would be his duty in many cases so to do, but then it ought to be a very strong case to warrant him in so proceeding. Now, on consideration, I think that in this case the arbitrator has proceeded a little too hastily. It appears that three different appointments for meetings were made, but it does not appear, as to any one of them, that it was made with reference to anything that had passed with the defendant, whereby he had agreed to fix either of the days, and that he afterwards, notwithstanding, absented himself. As to his excuse for absenting himself from the first, it is said that the defendant has made a representation which turns out not to be true, which is, that his counsel was out of town, and that on application at the Chambers of the counsel named, it appears that he had not been applied to. I do not think that to be very contradictory, for the defendant might have known that the counsel was out of town, and that, therefore, he had not applied to him, though he intended to do so on his return. It being stated that he had actually engaged this counsel raises a suspicion perhaps; but then, these facts appear on the last affidavits which have been sworn, and there is no opportunity for the defendant to give any explanation of them. The arbitrator, it appears, did not proceed with the reference at that first meeting, and then a notice was given to the defendant, which was a "peremptory" notice. The defendant, it appears, said immediately to the party, that he should not attend the meeting, and gave no reasons for not doing so; but he sent a very respectful letter to the arbitrator, giving good reasons for his refusal, one of which was an objection to the shortness of the notice, and another, an objection to the matter proceeding during the long vacation. The defendant declined attending the meeting for those reasons, and the arbitrator again abstained from proceeding with the reference at the second meeting. Another appointment

was then made for a day which was still within the long vacation, and the notice for it was not a "peremptory" notice, nor did it state that the arbitrator would proceed ex parte, if the defendant did not attend. A notice was also given by the attorney at the same time for one, but that did not state that he should apply to the arbitrator to proceed ex parte, in case the defendant did not attend. At the day of meeting, however, the arbitrator did proceed ex parte in the absence of the defendant. Now, I really think that it is so substantial an inconvenience, and so much prevents the doing justice between the parties, that a reference should proceed ex parte in the absence of one of the parties, that it must be a very strong case to justify an arbitrator so proceeding; and I think that such a strong case is not made out on these affidavits, and, therefore, this rule must be made absolute.

1841.
GLADWIN
v.
CHILCOTE.

Gurney then asked to have it made part of the rule, that the defendant should pay costs to the other party, under the usual clause in the order of reference, that if either party was guilty of wilful delay, he should pay such costs as the Court should direct.

COLERIDGE, J.—That must be the subject of a separate motion, so as to give the defendant an opportunity of answering the statement made against him.

Rule absolute.

REGINA v. SCAIFE and Wife.

ARMSTRONG shewed cause against a rule, obtained by *V. Lee*, for bailing the two defendants in this case before a magistrate in the country. They were charged under bailed, is founded on the probability of his appearing to take his trial, and not on his supposed guilt or innocence, but the fact of a bill having been found against him, is material in estimating that probability.

The principle on which a party committed to take his trial for an offence may be

1841.

REGINA
v.
SCAIFE
and Wife.

2 & 3 Wm. 4, c. 34, s. 10, with having certain coining moulds in their possession, and a bill of indictment had been found at the sessions. A certiorari had been issued, and the depositions returned. It was submitted, that on considering the case disclosed by the depositions, and the fact that the bill of indictment had been found, the present case could not be considered as one in which the Court ought to interfere in the manner sought by this application.

Baines and *V. Lee* supported the rule, and submitted that the facts on the face of the depositions only amounted to a case of suspicion, and the circumstance of the bill of indictment having been found, ought not to prevent the parties from having their liberty, until the assizes.

Cur. adv. vult.

COLERIDGE, J.—I have examined the depositions and affidavits in this case, but before I say what I shall do, I wish to express my opinion as to the grounds on which I act. I conceive that the principle on which parties are committed to prison by magistrates previous to trial, is for the purpose of ensuring the certainty of their appearing to take their trial. It seems to me, that the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. It is on that account alone, that it becomes necessary to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy. It is to be observed, that the statute 5 & 6 Wm. 4, c. 33, s. 3, extending the provisions of the former statute, 7 Geo. 4, c. 64, authorizes magistrates to admit to bail persons charged with felony even where they have confessed their guilt. In the present case, I think that as to the wife, there is so much reason to think from what appears on the affidavits, that she will be acquitted, that it is unnecessary to continue her

imprisonment. As to her husband, I come to a very different conclusion. The offence is a serious one, the punishment is considerable, and the evidence, as it appears, is strongly presumptive of guilt. It is also to be observed, that this is an application after a true bill has been found by the grand jury against the prisoner, and that point has been held to be material in two cases by Lord Abinger (a) and my Brother Patteson (b); and as on this ground, there is no longer any doubt that a trial will take place. It is, therefore, so much the less likely a party should wish to expose himself to the risk of a trial. The rule must, therefore, be made absolute as to the wife; but must be discharged as to the husband.

1841.

REGINA
v.
SCAIFR
and Wife.

Rule accordingly.

(a) *The Queen v. Chapman*, 8 Car. & Pay. 558.

(b) *The Queen v. Gutteridge and Others*, 9 Car. & Pay. 228.

See Morris v. Chadwick. 7. 2 B. 260.

FAITHFUL v. ACHLEY.

(Before the Four Judges.)

Reported. 1 Q. B. 165 sub nom: Faithful & Achley.

COMMON count in debt for goods sold, &c. Plea, payment into Court of the sum of, &c.; and that defendant never was indebted to the plaintiff in a greater amount than the said sum of, &c. Replication, that the defendant was indebted in a greater amount, &c. Special demurrer, that the plaintiff ought to have replied that the defendant "was and is indebted," &c., pursuant to the form provided by Reg. Gen., T. T., 1 Vict. 1838.

Lush appeared to support the demurrer, but the Court called upon

Petersdorff, in support of the replication. A departure

replication, provided by Reg. Gen., T. T., 1 Vict.

To a common count in debt, the defendant pleaded payment into Court, and that he never was indebted to a greater amount. Replication, that he was indebted to a greater amount: *Held*, on demurrer, that the replication was bad, for not stating that the defendant "was and is indebted," according to the form of

1841.
 FAITHFUL
 v.
 ACHLEY.

from the forms given by the rule in a matter not material, will not vitiate. The plaintiff declared for a debt due at the commencement of the action, and the replication refers to the same period of time. [*Littledale, J.*—"Never was indebted" extends from the time of the defendant's birth to that of his plea. The replication must fix the time. Lord *Denman, C. J.*—The issue you have taken is, whether the defendant ever was indebted to the plaintiff, which is quite immaterial. *Patteson, J.*—The replication does not support the declaration which shews a present debt.] The same accuracy is not required as in a plea of set-off.

Lord DENMAN, C. J.—The plaintiff has studiously abstained from stating what is required by the rule, and what is also necessary for carrying on the action.

Judgment for the Defendant.

Doe dem. COOLING v. APPLEBY.

(*Before the Four Judges.*)

Where the lessor of the plaintiff in ejectment has been nonsuited at the trial, in default of the defendant's appearance to confess lease, entry, and ouster, the latter may have a new trial on the merits, on payment of costs as between party and party, not as between attorney and client.

EJECTMENT. At the Summer Assizes, 1839, for Somersetshire, the cause appeared in the cause list, and was called on for trial in regular order; but as the defendant did not appear to confess lease, entry, and ouster, the lessor of the plaintiff was nonsuited, and was entitled to sign judgment.

Bere, for the defendant, afterwards obtained on affidavit, a rule nisi for a new trial on terms; against which

Barstow now shewed cause, and said, that it was unusual to grant a new trial in ejectment, as the defendant was not concluded by the judgment in that action; and that, at all events, the defendant should pay costs as between attorney and client. *De Rouffigny v. Peale (a)*.

(a) 3 Taunt. 484.

Bere, contra, cited *Doe d. Mullarky v. Roe* (a), and consented to try on the merits, as between the defendant and the lessee of the plaintiff, without setting up any outstanding legal estate.

1841.
Doe dem.
COOLING
v.
APPLEBY.

Per CURIAM.—In ordinary practice, the costs are costs as between party and party, and not as between attorney and client; and this rule will be absolute, on payment of such costs.

Rule absolute.

(a) 3 Per. & Dav. 316.

CHAMBERS v. BARNARD.

CHAMBERS, on shewing cause against a rule, obtained by *Pashley*, for setting aside the declaration, and all subsequent proceedings in this cause, for irregularity, proposed to use an affidavit made by one Jones, to which

If the date mentioned in the jurat of an affidavit is struck out with a pen, and the right date introduced, it is an excuse within Reg. Gen., 37 Geo. 3, which will prevent the affidavit from being heard.

Pashley objected. In the jurat was written, "one thousand eight hundred forty," but between the words "hundred" and "forty" the words "and thirty" were seen; they were quite legible, but a pen had been drawn through them. This was clearly an interlineation within the Rule of Court of M. T., 37 Geo. 3 (a), which provides, "that no affidavit be read or made use of in any matter depending in this Court, in the jurat of which there shall be any interlineation or erasure." He referred to *Williams v. Clough* (b), as shewing the strictness with which the Court adhered to this rule.

COLERIDGE, J., held the affidavit inadmissible.

(a) 7 T. R. 82.

(b) 1 A. & E. 376.

1841.

The QUEEN v. The Directors of the BLACKWALL RAILWAY.

(Before the Four Judges.)

In a case in which, by agreement, between the parties, an application was made for a mandamus, merely with a view to obtain the opinion of the Court whether on the construction of a private act, the proceeding by mandamus was the proper one, the Court stopped the argument, and refused to give any decision.

THIS was a rule for a mandamus to be directed to the defendants, commanding them to issue under the act which constituted the Company, their warrant to the coroner to summon a jury for the purpose of assessing the amount of compensation claimed by a party who described himself as having suffered injury in consequence of the Company's works. In the first instance, the complainant had of his own authority, sent a precept to the coroner, but his application was refused there, on the ground that his proper remedy was, by obtaining from this Court a mandamus to the directors as above stated.

Sir F. Pollock, when appearing to support the rule, said, that it had been agreed between the parties, that the present application should be made to the Court, in order to obtain the construction which the Court might think proper to put upon the clause of the act, providing the mode by which parties complaining of being injured by the Railway should be compensated. He was stopped.

LORD DENMAN, C. J.—The argument cannot proceed. It now appears that there is no question at present *bonâ fide* in contest between these parties. When there is a doubt as to the mode of proceeding under an act of Parliament, the parties must act on their own responsibility, and not come and ask advice from the Court, which is not bound to give them directions, before a matter is properly ripe for a judicial determination. On this ground, the Court must now decline giving any opinion on the act. The rule may be absolute for the mandamus if the party likes to take it.

Rule absolute.

1841.

BROMAGE v. RAY.

COWLING shewed cause against a rule nisi, obtained by *James*, for setting aside a writ of distringas on the ground of irregularity. The irregularity complained of was, that the distringas had issued after the expiration of the four months, during which the writ of summons on which it was founded, was in force. The writ of summons issued on the 30th of June. On the 9th of November, an application was made, and granted accordingly. On the 10th of November, the writ of distringas issued. The question was, whether the writ of distringas so issued, after the expiration of the period of four months from the issue of the writ of summons, was regular. That depended on the construction to be put on the 2 Wm. 4, c. 39, ss. 3, 10. By the former section, it was provided, "that in case it shall be made appear by affidavit to the satisfaction of the Court out of which the process issued, or in vacation, of any Judge of either of the said Courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then, and in any such case, it shall be lawful for such Court or Judge to order a writ of distringas to be issued," &c., "in order to compel the appearance of such defendant." Then by s. 10, it was provided, "that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein may not have been arrested thereon or served therewith." There was nothing in any of those provisions which shewed that the writ of distringas must necessarily issue within four months from the date of the writ of summons. On the contrary, the language of the section seemed to require an opposite con-

If a writ of summons has issued, and suitable efforts have been made to serve it during the four months, which the Uniformity of Process Act provides, that it shall be in force, it is no objection to a writ of distringas founded on the summons, that it issued after the expiration of that writ.

1841.
 {
 BROMAGE
 v.
 RAY.

struction. It might be said that as the writ of distringas was to issue in consequence of the defendant not appearing the day on which the four months expired, that might be considered as the return day of the writ of summons. If the old practice under the 51 Geo. 3, c. 124, s. 2, and 7 & 8 Geo. 4, c. 71, s. 5, and the form of notice required by those statutes previous to issuing a writ of distringas, it would seem that the writ of distringas ought properly to be issued *after* the expiration of the writ of summons, in the same manner as under those statutes the writ of distringas was to issue after the return day of the previous process. In *Randell v. Wheble*, (a), which was an action against the sheriff for not arresting within a reasonable time after the delivery of a *capias* to him; the Court, in speaking of the writ of *capias*, issued under the authority of the Uniformity of Process Act, treated the day on which that writ expired by the lapse of four months as the return day of it, if it was not executed or directed to be returned by an order of a judge. [Coleridge, J.—Your argument would go to the extent of shewing, that the writ of distringas could not be issued until the expiration of four months from the date of the writ of summons, now the practice is commonly to issue it sooner]. Although the distringas might be issued sooner than the writ of summons had expired, it did not follow that it would be irregular to wait until it had expired, before the writ of distringas was issued. It was true, that in the case of *Lemon v. Lemon* (b), the Court of Common Pleas held, that a distringas to compel an appearance cannot issue after the expiration of the writ of summons on which it is founded. But there, a considerable lapse of time had occurred between the expiration of the writ of summons and the application to issue the writ of distringas, that was from the 29th of May to the 23rd of November. That laches on the part of the plaintiff would be sufficient ground for refusing the application. A similar decision was pro-

(a) 2 P. & D. 602.

(b) 2 Scott, 506.

nounced by the same Court in *Abbotts v. Kelly* (a). There, however, the report was very short, and the exact words of the statute did not appear to have been brought to the notice of the Court, and the decision was, "The words of the act are positive, and therefore the writ of distringas must be set aside." But, in a subsequent case, that of *Norman v. Winter* (b), the authority of those two previous decisions was materially shaken. A part of the decision in the latter case was, that "where a writ of summons had been issued, but had been allowed to expire, the plaintiff may nevertheless continue it by alias and pluries, and issue writs of distringas thereupon by leave of the Court or a judge." If the writ of summons could be continued by alias and pluries, after it had expired, and a writ of distringas issued on such continued process, it was difficult to see why a distringas might not issue at once after the expiration of the original writ of summons. The case of *Lemon v. Lemon* and *Abbotts v. Kelly* were both cited there in argument, and the Court, after taking time to consider, observed, "But notwithstanding the cases which have been cited in which this Court refused to allow the issue of the writ of distringas, after the lapse of four months from the teste of the summons, we think, upon reconsideration, that the plaintiff's right to continue the writ of summons by alias and pluries, and to issue the writ of distringas thereupon, by leave of the Court or a judge, is not confined to the period during which the summons is in force." This intimation of the Court must be considered as overruling the decisions in the previous cases. The writ of distringas here issued must, therefore, be considered as regular, and the nisi rule discharged.

1841.

BROMAGE

v.
RAY.

James supported the rule, and contended, that the two cases of *Lemon v. Lemon* and *Abbotts v. Kelly* were clear authorities to support the first application. With respect to the passage in the judgment of the Court, in the case of *Norman*

(a) *Ante*, vol. 5, p. 478.(b) *Ante*, vol. 7, p. 304.

1841.
BROMAGE
v.
RAY.

v. *Winter*, which was supposed to overrule the previous cases, it would be seen that the Court only applied its observations to cases, where the original process had been continued. It was, besides, only an obiter dictum as to this case, for it was unnecessary to decide on such a state of circumstances, as was found in the present case. The two previous cases must, therefore, be considered as by no means affected by the latter decision.

Cur. adv. vult.

COLERIDGE, J.—The question in this case was, whether a *distringas* could lawfully issue after the expiration of four months, from the day of the date of the writ of summons, the necessary proceedings to entitle the plaintiff to apply for such *distringas* having been taken before. Independently of authority, there would seem no difficulty in answering this question in the affirmative. It can scarcely be doubted that an actual service of the writ at any time before the expiration of the four months, would be good, and that a neglect to appear after that time, to a writ served on the last day of the four months would justify the entering an appearance for the defendant, and that proceedings to judgment thereupon would be regular. If so, there seems as little reason to doubt that attempts to serve the writ may properly be made up to the end of the last day, and that having been made, the Court, or a judge in vacation, may direct the further process that is necessary to compel an appearance, or to entitle the plaintiff to proceed as for a default. In neither case, does it seem necessary that the writ itself should so remain in force, as *to be capable of being served actually*, at the time when the further process issues. It is obvious, that if a contrary rule should hold, the writ of summons, instead of having validity for four months, as the 2 Wm. 4, c. 39, s. 10, necessarily imports, will, in fact, in many cases, run only for a period short of four months, by the time necessary for the issuing and service of a dis-

1841.

BROMAGE

v.
RAY.

tringas, probably also of the return to it, and the subsequent proceedings thereon. Two cases, however, are cited, in which the Court of Common Pleas have decided, that a writ of distringas cannot issue, after the expiration of the four months. These are *Lemon v. Lemon* (a), and *Abbotts Kelly* (b). These cases are very shortly reported, and appear to have passed without much argument. In the first, leave to issue the distringas was refused. The writ of summons there had run out in May, and the application was not made till November, which delay alone would have justified the refusal to allow the distringas to issue. In the latter case, the Court only say that the words of the act are positive, and, therefore, the writ of distringas must be set aside. Now, the act only says the writ of summons shall not be in force more than four months. There are no words in it, which limit the issuing of the writ of distringas to the same period. If the same limitation applies to both, it is matter of inference, not of express enactment. Still, it would not become me, sitting here alone, to overrule these two decisions. But in a later and more considered case, that of *Norman v. Winter* (c), it appears to me, that the same Court has somewhat shaken their authority, both by the decision and the language used. One question there was, whether alias and pluries writs of summons, with distringases thereon, were regular, the alias and pluries having issued, and being tested after the writ of summons which they were intended to continue, had been suffered to expire, and the Court held that they were. *Lemon v. Lemon* and *Abbotts v. Kelly* were cited, but the Chief Justice delivering the judgment of the Court after time taken, said, “notwithstanding these cases, we think, upon re-consideration, that the plaintiff’s right to continue writs of summons, by alias and pluries, and so issue writs of distringas thereon by leave of the Court, or a judge is not confined to the period

(a) 2 Scott, 506.

(c) *Ante*, vol. 7, p. 304.(b) *Ante*, vol. 5, p. 478.

1841.
BROMAGE
v.
RAY.

during which the summons is in force." I understand the Court by this language to have re-considered the two former cases, and not entirely to approve of them. And if writs of continuance may be dated, and issue after the writ which they are intended to continue, has actually expired, as they certainly may, I see no legal principle which prevents the issuing a *distringas* to compel an appearance after that time, where the plaintiff has taken every step which entitles him to such *distringas*, before that time, and while the writ of summons was in full force; and the inconvenience suggested in one of the cases, that there might be no limit of time, when this might be done need not arise, for, the third section of the act leaves the Court or the judge a discretion; and it must be taken that where the plaintiff had slumbered an unreasonable time after the expiration of the four months, the Court or judge would refuse permission to issue a *distringas*; I repeat, that this case was not discussed, as I believe my brother *Patteson* intended it should be, in the full Court, but having a clear opinion on the point, considering too the intimation which may be collected from the language used in *Norman v. Winter*, and having had the benefit of conferring with my brother *Patteson*, on the subject, and ascertained his opinion to be in accordance with mine, I think I should not be justified in throwing upon the parties the delay and expense of another argument next term, and I am, therefore, induced to say, at once, that this *distringas* was regular, and that the rule must be discharged; of course, without costs.

Rule discharged, without costs.

1841.

REGINA v. The CORPORATION of TRINITY HOUSE,
DEPTFORD STROND.

DUNDAS, (with whom were *Bayley* and *Palmer*), moved for a rule to shew cause why a writ of mandamus should not issue, directed to the master and brethren of the Trinity House, at the instance of the mayor, aldermen, and burgesses of Great Yarmouth, commanding them to examine and certify to the commissioners of Her Majesty's customs, the claims which the said mayor, &c., had transmitted to them for certain duties, from the 29th September, 1835, to 25th December, 1839. Previous to the passing of the 5 & 6 Wm. 4, c. XLIX., (a local act), the corporation of Great Yarmouth was entitled to certain duties on imports into the haven of Great Yarmouth. By s. 126 of that statute, it was provided, "That during the term of twenty-one years, to be computed from the 29th day of September next after the passing of this act, the said mayor, aldermen, burgesses, and commonalty shall not collect or receive the several sums of sixpence for every chaldron of coals, culm, or cinders imported into the said port of Great Yarmouth, by persons not free of the said corporation of Great Yarmouth; and of 4s. 6d., payable by persons not being free of the said corporation, importing coals, culm, or cinders into the said port in any ship or vessel for the custom, outgoings, and pilotage of the said ship or vessel; nor the said several port duties or tolls called coal tonnage, murage, cranage, and tronage, or any of them, to which they are or may be entitled by prescription, usage, charter, act of Parliament, or otherwise, (save and except cranage dues on goods using the public crane), as aforesaid; and it shall be lawful for the said mayor, aldermen, burgesses, and commonalty, and they are hereby authorized and empowered, in lieu thereof, and by way of compensation for the temporary relinquishment thereof, from time to time during the said twenty-one years, to be computed as aforesaid, to

The Corporation of Great Yarmouth has no claim under 5 & 6 Wm. 4, c. XLIX. (local) to compensation, pursuant to 59 Geo. 3, c. 54, s. 9, and 1 & 2 Vict. c. 113, s. 27, for the diminution of duty on foreign vessels, importing and exporting commodities into and out of the haven, in consequence of commercial conventions between England and Foreign Powers, notwithstanding the general language of s. 128 of the Local Act, with reference to the previous provisions of that act.

1841.
REGINA
v.
The Corpora-
tion of
TRINITY
HOUSE.

ask, demand, take, receive, and recover, to and for their own use, the duties hereinafter mentioned; (that is to say), for every ton of all goods and articles of commerce, (fish, green or partially cured excepted) imported into the said haven of Great Yarmouth, or into Yarmouth Road aforesaid, in any vessel, the duty of one penny; and, in addition to such last mentioned duty, for every ton of all goods and articles of commerce (fish, green or partially cured excepted) imported into the said haven or road in any vessel not registered in the port of Great Yarmouth aforesaid, the duty of fourpence." By sect. 127, it was provided, "That the several duties last hereinbefore granted and made payable to the mayor, aldermen, burgesses, and commonalty of the said borough of Great Yarmouth, *shall be over and above and in addition to the duties first hereinbefore granted and made payable to the said commissioners of the haven of Great Yarmouth.*" Then by sect. 128, it was provided, "That it shall be lawful for the said mayor, aldermen, burgesses, and commonalty of the borough of Great Yarmouth, from time to time, to appoint a collector of the duties by this act, granted and made payable to them, and to suspend or displace such collector, and to appoint any other in his place, and to pay such salary or an allowance to such collector as they shall think fit, *and all powers, authorities, regulations, proceedings, penalties, forfeitures, and provisions contained in this act with reference to the payment and collection of the duties hereinbefore granted and made payable to the commissioners of the haven of Great Yarmouth, and also with reference to the person by them appointed to collect or receive the same, shall be deemed and taken to be applicable to the payment and collection of the duties hereinbefore granted and made payable to the mayor, aldermen, burgesses, and commonalty of the said borough of Great Yarmouth, and to the person by them appointed to collect or receive the same, in the same manner and as fully and effectually in all respects, as if such powers, authorities, regulations, proceedings, penalties, forfeitures, and provisions*

had been repeated and re-enacted with reference expressly to the payment and collection of the duties hereinbefore granted and made payable to the mayor, aldermen, burgesses, and commonalty of the said borough of Great Yarmouth, and also with reference expressly to the collector or other persons by them appointed to receive the same." In order to see the force of the words, "all powers, authorities, &c.," it was unnecessary to refer to the previous sections of the act. By sec. 42, certain duties were imposed on certain articles of commerce entering the haven of Great Yarmouth, which were to be collected by certain commissioners appointed by the act for improving the haven. Then by sect. 44, it was provided, "That double the duties which from time to time shall be imposed *by virtue of this act* in respect of British vessels, shall be payable *in respect of foreign vessels*, and also in respect of all goods or articles imported or exported in such foreign vessels, and every vessel shall be deemed a foreign vessel, within the meaning of this act, which shall not be entitled to the privileges of a British built ship or vessel by virtue of an act passed in the third and fourth years of the reign of his present Majesty king William the Fourth, intituled, "An act for the encouragement of British shipping and navigation." By sect. 45, "That it shall be lawful for his Majesty, in and by an order of council, or for the lords commissioners of his Majesty's treasury, or any three or more of such lords commissioners, by an order in writing from time to time, to reduce the duties which shall be imposed on foreign vessels, under the powers of this act, on all, or on such, or on so many of such vessels, and on all, or on such, and on so many of the goods or articles imported or exported in such vessels as his Majesty, or as the lords commissioners as aforesaid shall deem expedient to the same, or the like duties as shall, by virtue of this act, be payable at the time in respect of British vessels." By sect. 46, "That it shall be lawful for the said commissioners, from time to time, to reduce all or any of the

1841.

REGINA

⁂
The Corpora-
tion of
TRINITY
HOUSE.

1841.
REGINA
v.
The Corpora-
tion of
TRINITY
HOUSE.

duties by this act granted and made payable to them, and again to raise the same to any amount not exceeding the respective duties by this act granted, and such reduced, and also such advanced duties shall be paid, collected, recovered, and applied in the same manner as the duties in this act specified, and made payable to the said commissioners, are directed to be paid, collected, recovered, and applied." It was contended by the corporation of Great Yarmouth, that the provisions of sect. 128, referred to the enactments of sect. 44, and, consequently, that in addition to the duties authorized to be taken in lieu of those granted in the time of Queen Anne, they had a right to double those duties by the operation of sect. 44, where the goods were imported in any foreign vessel. If so, then they had a claim to compensation from the commissioners of customs pursuant to the provisions of 59 Geo. 3, c. 54, s. 9, and 1 & 2 Vict. c. 113, s. 27. The former act was passed for the purpose of enabling the then king to carry into effect a convention of commerce between the United States and Portugal with England. As the effect of this statute was to interfere with certain vested interests of certain corporations as an indemnity, it was provided, by sect. 9, "That whereas it is expedient that the said corporation, trustees of Ramsgate harbour, other bodies politic and corporate, and sundry other persons in whom such rates and duties are vested respectively, should be indemnified for the loss sustained by means of this act, Be it further enacted, that the difference in such cases between the rates and duties due and payable on British ships and those payable on foreign ships, shall be paid out of the consolidated duties of customs, and for the more effectual security of the public revenue in respect of any claims which in virtue of this act may be made, all and every such claim or claims shall be transmitted by the aforesaid trustees, bodies politic or corporate, or persons interested, or their agent or agents, to the corporation of Trinity House of Deptford Strond, who are hereby required to

examine the same, and being satisfied as to the correctness thereof, are to certify the same accordingly under the hand of their secretary or other proper officer, together with such claim as the said corporation may have, to the commissioners of his Majesty's Customs in London quarterly, for their order for the payment thereof, and the said commissioners are hereby required to direct payment of such claims out of the consolidated duties of customs to the said corporation of Trinity House of Deptford Strond, and the said corporation are hereby required, after retaining what may be due as their right, to pay over to the trustees of Ramsgate Harbour, to other bodies politic and corporate, and to sundry persons in whom such rates and duties may be vested respectively, the amount of their respective claims, subject only to such incidental or other charges as have heretofore been made in the collection of such rates and duties." Then by the 1 & 2 Vict. c. 113, s. 27, those provisions were extended to conventions of commerce with all foreign powers as well as the United States and Portugal. It was to obtain the compensation so suggested as due to them, that the present application was made, in order that the corporation of Trinity House might be compelled to report on the claim, as by a variety of alterations which had been made in the duties on importations in foreign vessels pursuant to treaties, a right had accrued to the Corporation of Great Yarmouth to recover the difference between the duties on foreign vessels and British vessels.

Cur. adv. vult.

COLERIDGE, J.—This was an application for a mandamus to be directed to the master and brethren of the Trinity House on the part of the mayor, aldermen, and burgesses of Great Yarmouth, commanding them to examine and certify to the commissioners of her Majesty's Customs the claims which the said mayor, &c., have transmitted to them

1841.
REGINA
v.
The Corpora-
tion of
TRINITY
HOUSE.

1841.
REGINA
v.
The Corpora-
tion of
TRINITY
HOUSE.

for certain duties from the 29th of September, 1835, to 25th of December, 1839. The case was stated to me a few days since very fully, clearly, and candidly by Mr. *Dundas*, and I had at the time so strong an impression, that I ought not to grant the rule, that it became my duty to examine the papers and statutes referred to before I granted it. The result of that examination has been to satisfy my mind entirely, that I should only put the parties to a needless expense, if I was to give an opportunity for the agitation of the question which the corporation of Yarmouth desire to raise. By 5 & 6 Wm. 4, c. XLIX, s. 126, the corporation of Yarmouth are forbidden to collect certain duties, to which they were before entitled, for the term of twenty-one years, from the 29th of September, 1835, and in lieu thereof, they are empowered for that period to collect two specified duties; 1st, the duty of one penny for every ton of goods, &c. (with certain exceptions), imported into the haven, &c. in *any* vessel; 2nd, an additional duty of fourpence per ton if the importing vessel be not registered in the port of Great Yarmouth. The corporation contend, that they are entitled to double these duties, where the goods are imported in any foreign vessel. If they are, they will then be brought with respect to these double duties within the operation of the 59 Geo. 3, c. 54, s. 9, as extended by the 1 & 2 Vict. c. 113, s. 27, which statutes provide in effect, that where by any treaty of commerce the vessels of any nation are admitted to trade in our ports on payment of the same duties as British vessels, and are thereby relieved from the payment of higher duties, any corporations or individuals entitled to receive such higher duties, shall be indemnified out of the consolidated duties of customs; and the mode of procuring such indemnification, is by the transmission of their claims and accounts to the corporation of the Trinity House, who are to examine the same, and if satisfied as to the correctness thereof, to certify the same to the commissioners of Customs for their order for the payment

thereof. Upon this state of facts and law, the application is founded, and the question, therefore, is in the first place, whether the corporation are entitled to the double duties. If it be clear that they are not, then it is useless to examine whether there be any formal objections to the rule, and if there be none, equally useless to grant it, as the Trinity House, after examination, ought to grant no certificate. In my opinion, it is clear that the corporation have no such right as they insist on. The statute 5 & 6 Wm. 4, c. XLIX, under which the claim is made, is an act for improving the haven of Great Yarmouth, repairing or rebuilding certain bridges, and for suspending, for a limited period, certain duties payable to the corporation, and imposing other duties in lieu thereof. In order to effect the two former purposes, certain commissioners are appointed, whose qualifications are defined, and to whom powers are granted through numerous sections of the act. By the 42nd section, certain duties are granted to them, and the 44th section doubles these duties in respect of foreign vessels, and goods or articles imported or exported in such foreign vessels. The 45th section gives the Crown, or the lords of the treasury, power to reduce the duties imposed by the act on foreign vessels or goods. And the 46th section, to reduce any of the duties imposed by the act, and again to raise them. Then follow many sections containing provisions and regulations concerning and for enforcing the collection and payment of these duties. It is not until we arrive at the 126th section that we come to any provision which affects the corporation. All before regards these purposes of the act which are to be carried into effect by the commissioners. That section recites that the corporation, under a statute passed in the fifth year of Queen Anne, had received certain duties, and that for the period of twenty-one years, it was inconvenient that these duties should be received; it, therefore, takes them away for that period, and authorizes the corporation for the same period to collect the two duties I have before mentioned. The 127th section carefully distinguishes between these

1841.
 REGINA
 v.
 The Corpora-
 tion of
 TRINITY
 HOUSE.

1841.
REGINA
v.
The Corpora-
tion of
TRINITY
HOUSE.

duties and those made payable to the commissioners. The 128th section authorizes the corporation to appoint, suspend, displace, and pay a collector of those duties, and then follow the words on which this application is founded: "And all powers, authorities, regulations, proceedings, penalties, forfeitures, and provisions contained in this act with reference to the payment and collection of the duties hereinbefore granted and made payable to the commissioners of the haven of Great Yarmouth, and also with reference to the person by them appointed to collect or receive the same, shall be deemed and taken to be applicable to the payment and collection of the duties hereinbefore granted and made payable to the mayor, aldermen, burgesses, and commonalty of the said borough of Great Yarmouth, and to the person by them appointed to collect or receive the same, in the same manner, and as fully and effectually in all respects as if such powers, authorities, regulations, proceedings, penalties, forfeitures, and provisions had been repeated and re-enacted with reference expressly to the payment and collection of the duties hereinbefore granted and made payable to the mayor, aldermen, burgesses, and commonalty of the said borough of Great Yarmouth, and also with reference expressly to the collector or other person by them appointed to receive the same." Under these words, the corporation must contend, that the right to take a double duty from foreign vessels is merely a power or authority, a regulation, a proceeding, or a provision with reference to the payment and collection of a single duty. But, if the 43rd and 44th sections be referred to and read together, it is obvious that the first grants certain duties in respect of British vessels; the second makes a distinct grant of the same duties, doubled in respect of foreign vessels. The latter is not a regulation as to the collection of the duties granted by the former, but a new grant stated shortly, referring for its details to the former section. No such grant is made in terms to the corporation, but all vessels not registered in the port of Great

Yarmouth are liable to the additional four-penny duty beyond the one penny per ton. The general expressions of the 44th section itself, independently of the 128th section, have very properly not been relied on; not only its collocation and the general division of the act prevent it from bearing on this question, for, it is in terms confined to duties to be imposed by virtue of the act from time to time, and referring in those words to the provision of the 45th and 46th sections; whereas the duties granted to the corporation by the 126th section are a fixed compensation for duties suspended during a definite number of years. If I could entertain the least doubt on this point, I should certainly allow the writ to issue, that the claim might be fully inquired into; but when my mind is clearly made up, that the applicants have no legal right, it is my duty, however important the claim, or the body which makes it, to act upon my judgment, to prevent useless expense and litigation, and to refuse the rule.

Rule refused.

WILSON v. FIRTH.

KNOWLES shewed cause against a rule nisi, obtained by Sir *F. Pollock*, calling on the plaintiff to shew cause why a bond given pursuant to the provisions of 1 & 2 Vict. c. 110, s. 8, should not be delivered up to be cancelled. It appeared that the bond had been given in the form prescribed by the statute, to the satisfaction of the Bankrupt Court. That bond had been satisfied, and now remained in the hands of the plaintiff's attorney. On it, the attorney had a lien, and he was not, therefore, bound to allow it to leave his possession, until that lien was satisfied. The case had already been before Mr. Baron *Alderson*, and he had declined to interfere, as he had a doubt whether he had power to do so. Besides, the Court, to which such an application as the present must be made, was the Bankrupt Court. The

1841.
REGINA
v.
The Corpora-
tion of
TRINITY
HOUSE.

Where a bond is given pursuant to 1 & 2 Vict. c. 110, s. 8, the Court in which the action is brought, has power to direct it, when satisfied, to be delivered up to be cancelled, although the plaintiff's attorney may have a lien upon it for costs; and it is not necessary to apply to the Court of Bankruptcy, for that purpose.

1811.

WILSON

v.

FIRTH.

words of the section, in accordance with which the present bond had been given were, "That if any single creditor, or any two or more creditors being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors, whose debt shall amount to 150*l.* or upwards, or any three or more creditors, whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force, respecting bankrupts, shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing, requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits, and notice to pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with such two sufficient sureties, as a commissioner of the Court of bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court, or any judge thereof, shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy, on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader, within two calendar months from the filing of such affidavit or affidavits, but not otherwise." As the bond was to be entered into, to the satisfaction of a commissioner of the Bankrupt Court, according to the pro-

visions of the section, the application for the purpose of obtaining the delivery up of the bond must be to that Court. [*Coleridge, J.*—Is not the bond satisfied?] Certainly, by the payment of a certain sum to the plaintiff, as a compromise for the debt and costs. But if the sum paid for costs by the defendant, did not satisfy the attorney's claim for costs, in respect of these proceedings, he had a lien on this bond for the residue as against his client, for those costs. But, under any circumstances, this Court had no jurisdiction to order the bond to be delivered up.

1841.

WILSON
v.
FIRTH.

Sir F. Pollock. The bond stood in precisely the same situation as bail. If so, the Court had clearly an equitable jurisdiction to interfere in the manner proposed. The question was, whether the defendant should be compelled to go into a Court of Equity, or the Court of Bankruptcy, to have cancelled a security which it was admitted was functus. It was a rule in equity, that if a party obtained a security which became functus, the party giving it had a right to have it cancelled. Then came the question, whether this Court had the power to do the same thing? By analogy to the interference by the Court, to direct bail-bonds to be delivered up to be cancelled, the Court had clearly such a power.

COLERIDGE, J.—There can be no doubt that that which is required to be done, should be done. The only doubt which I felt, was, whether the Court had such a power as would enable them to do it; or whether that power was confined to the Court of Bankruptcy. It is said, that the power to do so, only belongs to the Court of Bankruptcy; but it seems to me that where that Court has directed the bond to be given, it has done all that it has power to do with it. Many cases may be supposed, in which this Court must exercise a jurisdiction over the bond to determine whether it should be put in suit, or what course ought to be pursued as to it. I think it is much more convenient to hold, that

1841.

WILSON
v.
FIRTH.

this Court has power to determine whether it ought to be delivered up to be cancelled; I think it ought. The present rule must, therefore, be discharged, but without costs.

Rule absolute, without costs.

TOWERS v. NEWTON.

(Before the four Judges.)

After an insufficient levy, under a fi. fa. in Yorkshire, where the venue in the action was laid, the plaintiff, on the 6th of July, issued a ca. sa. reciting the fi. fa. and return, into Middlesex, for the residue. On the 31st of August, and before the Middlesex writ was executed he issued a ca. sa. for the residue into Yorkshire, under which the defendant was taken and discharged, in September, on the ground of privilege. In January following, the defendant was taken under the writ into Middlesex: *Held*, on motion to discharge him out of custody, that the writ into Middlesex ought to have been a testatum ca. sa. founded on a ca. sa. into Yorkshire, and was irregular, and that the Court could not amend it by the ca. sa. into Yorkshire, which bore a later date.

SIR W. W. FOLLETT had obtained a rule, calling on the plaintiff to shew cause, why the defendant should not be discharged out of the custody of the Marshal, as to this action; and why a capias ad satisfaciendum, directed to the sheriff of Middlesex, and the execution thereof, should not be set aside, with costs for irregularity. The venue in this action, which was on a promissory note, was laid in Yorkshire. The plaintiff having signed judgment, issued on the 12th of March, 1840, a fieri facias directed to the sheriff of Yorkshire, indorsed to levy the debt and costs, interest, and expenses. The sheriff levied part only of the sum indorsed, and returned that the defendant had no more goods in his bailiwick. On the 6th of July, a writ of capias ad satisfaciendum for the residue issued into Middlesex, which recited the fi. fa. into Yorkshire, and the return thereto, and commanded the sheriff of Middlesex to take the body of the defendant in execution for the residue of the plaintiff's damages and interest. While this writ was running, a capias ad satisfaciendum for the residue issued into Yorkshire, on the 31st of August, under which the defendant was arrested on the 4th of September, but he was discharged out of custody on the 26th of September, by Rolfe, B., on habeas corpus, after argument, on the ground

that the writ into Middlesex ought to have been a testatum ca. sa. founded on a ca. sa. into Yorkshire, and was irregular, and that the Court could not amend it by the ca. sa. into Yorkshire, which bore a later date.

that a barrister, on his return from attending the petty sessions at Ripon, he was privileged from arrest. On the 7th of January, 1841, the defendant was taken by the sheriff of Middlesex, under the *capias ad satisfaciendum* issued on the 8th of July previously. On motion for this rule it was contended, that the arrest of the defendant in Yorkshire, and his discharge on the ground of privilege, operated as a satisfaction of the judgment; and if not, that the process into Middlesex ought to have been by a *testatum writ*, founded on an original *capias* into Yorkshire. A cross rule had been obtained to amend the writ, by the insertion of a *testatum* clause.

1841.

TOWERS
v.
NEWTON.

S. Martin now shewed cause. A discharge of a defendant in execution will not operate as a satisfaction of the debt, unless it took place with the consent of the plaintiff, *Vigers v. Aldrich* (a), *Jaques v. Withy* (b). There was no consent in the present case. Again, the arrest of the defendant, while privileged, was an irregularity in the sheriff, which will not prejudice the plaintiff, *Nadin v. Battie* (c), *Collins v. Beaumont* (d). Secondly, it is not necessary that the writ in Middlesex should be a *testatum writ*, founded on a prior *ca. sa.* into Yorkshire, because a plaintiff may issue both a *fi. fa.* and a *ca. sa.* at the same time; or he may have several writs of the same sort running at the same time into different counties, *Tidd's Prac.* 995. In *Lush's Prac.* p. 502, it is said, that "in practice, an original writ, as the writ into the first county is called, never issues, but the party sues out the *testatum* in the first instance; and even where the *testatum* clause has been improperly omitted, and an application made to set it aside, the Court will, where no injustice can be done, give leave to amend, upon production of an original, which, for this purpose, may be sued out at any time, and returned by the attorney." Under the cross rule, the Court will allow an

(a) 4 Burr. 2482.

(b) 1 T. R. 557.

(c) 5 East, 147.

(d) 10 A. & E. 225; 2 Per. &

Da. 363.

1841.

TOWERS

v.

NEWTON.

amendment by introducing the testatum clause, *Palmet v. Price* (a), *Esdaile v. Davis* (b), *Shaw v. Maxwell* (c), *Meyer v. Ring* (d), *Cowperthwaite v. Owen* (e), *Milstead v. Coppard* (f).

Sir *W. W. Follett*, contra. The defendant was arrested and imprisoned in Yorkshire, under a valid writ, and his discharge, whether by consent or otherwise, prevented a second arrest on the same judgment, *Blackburn v. Stupart* (g), per *Grose, J.* In *Collins v. Beaumont* (h), the writ, by virtue of which the first arrest was made, was an irregular writ, which distinguishes that case from the present. Here, a plaintiff once had execution, which is a satisfaction of the debt, *Tidd's Prac.* pp. 174, 1029. The stat. 2 Geo. 1, c. 13, s. 2, which is confined to privilege of Parliament, shews that a discharge on the ground of any other privilege, would bar a second arrest. On the second point, in *Lush's Prac.* p. 502, it is stated, that "in strictness, every writ of execution must, in the first instance, be issued into the county in which the venue is laid; then, upon a return, that the party, or his lands or goods cannot be found, or that enough has not been levied in that county, a new writ may issue into any other county, either for the whole, or the residue, as the case may be. The latter, upon the principle before stated, must contain an allegation of the issuing of and the return of the former, and it is therefore called a testatum writ." The ca. sa. into Middlesex, merely reciting the fi. fa. into Yorkshire, was irregular, and cannot justify the present arrest; it ought to have been a testatum ca. sa. founded upon and reciting a prior ca. sa. into Yorkshire. Here, the ca. sa. into Yorkshire issued long after the Middlesex writ; the Court cannot amend. In the cases cited, where an amendment was allowed, the writ on which the arrest was

(a) 2 Salk. 589.

(b) 6 Dow. P. C. 465.

(c) 6 T. R. 450.

(d) 1 H. Bl. 541.

(e) 3 T. R. 657.

(f) 5 T. R. 272.

(g) 2 East, 243.

(h) 10 A. & E. 225; 2 Per. & D. 363.

made, was in itself a good writ, and the objection to the want of an original ca. sa. was matter of form only; but here, the objection to this writ is, that it is an original ca. sa., and the production of another original into Yorkshire, will not make it a testatum writ. The testatum clause is wanting. At all events, the Court will not allow an amendment after arrest, or on a rule obtained only two days before the present rule was due.

1841.

TOWERS
v.
NEWTON.

LITTLEDALE, J.—Two grounds have been relied upon in support of this rule. First, that the defendant could not be twice arrested on this judgment. As that question may come before us on another rule, I give no opinion upon it at present. The second ground is, that the writ into Middlesex, under which the defendant is in custody, was irregular. The facts are these, the venue is in Yorkshire, into which county a fi. fa. issued in the first instance, and and on the 31st of August, 1840, a ca. sa. followed into the same county, for the residue. It was not necessary that that writ should be a testatum writ. The defendant was taken in Yorkshire, and discharged on the 26th of September. On the 7th of January, 1841, he was arrested in Middlesex, under a ca. sa., which had issued on the 6th of July, 1840. That was not a testatum writ which it ought to be; and by reason of that irregularity the defendant is entitled to be discharged. But a rule was obtained two days ago to amend the writ. I think an amendment cannot be allowed, for two reasons: first, the application to amend might have been made earlier; it might have been made immediately on the application for the discharge; and, secondly, the writ into Middlesex cannot be made a testatum writ, on the foundation of an original ca. sa. into Yorkshire, which had no existence until more than a month after the Middlesex writ had issued. I think, therefore, that this rule must be absolute.

PATTESON, J.—I give no opinion on the first point. I

1841.

TOWERS
v.
NEWTON.

agree with my brother *Littledale*, that the writ into Middlesex was irregular. The meaning of a testatum clause, which is inserted in a writ issued into any other county than where the venue lies, is, that the sheriff of the county of the venue cannot execute the original *ca. sa.*, by taking the body of the defendant. But the Middlesex writ, in the present case, does not shew that the defendant's body was not in the bailiwick of the sheriff of Yorkshire, and liable to arrest. We are then asked to amend. But under stat. 3 & 4 Wm. 4, c. 67, s. 2, writs of execution may be dated on the day they are issued; and we cannot make this writ, tested on the 4th of July, a testatum writ on the foundation of an original writ tested on the 31st of August.

COLERIDGE, J., concurred (a).

Rule absolute. No action to be brought.

(a) Lord DENMAN, C. J., was absent during the argument.

JONES v. REGAN.

Where an issue has been directed under the Interpleader Act, to try the right to a bill of exchange, the bonâ fide owner of it is entitled to the amount of the bill, and all costs from the wrongful claimant, so as completely to indemnify himself.

THIS was an issue directed by the Court, under the Interpleader Act, 1 & 2 Wm. 4, c. 58, s. 1, to try the right of the plaintiff and defendant to a bill of exchange, under these circumstances (a). A person named Serle, and another person, were the acceptors of the bill, and Jones was the bonâ fide holder of it. He accidentally lost it, and after a time, it was found in the possession of Regan, who demanded payment of it from Serle. Notice of the loss having been given by Jones to Serle, he refused to pay it, and an action was commenced by Regan against him in this Court. An action was also commenced against Serle by Jones, the former having refused to pay on an indemnity

(a) See the case, *ante*, p. 193.

being offered by the latter. Serle and his co-acceptor then applied to the Court for a rule under sect. 1 of the Interpleader Act, and the present issue was accordingly directed. In it, Jones was successful. The amount of the bill having been paid into Court, the case now came on, for the purpose of disposing of the fund, and giving directions as to costs.

1841.

JONES
v.
REGAN.

Platt appeared for the plaintiff Jones, and contended, that his client was entitled to have the amount of the bill out of Court untouched; to the costs of the action he had been compelled to bring in the Exchequer against the acceptors; to the costs of the issue, and of the present application, and that these costs should be paid by Regan, whose conduct had given rise to this expenditure.

Martin appeared for the acceptors, and submitted, that his clients were entitled to their costs of the Interpleader rule, and of appearing on this application out of the fund in Court, as it appeared that they had acted bonâ fide. *Duear v. Mackintosh (a)*.

Miller appeared for Regan.

COLERIDGE, J.—I think that in this case Jones is entitled to have the fund out of Court untouched. The only wrong doer is Regan. He has occasioned Serle's expense, and the necessity for the application to this Court. He has also caused the action brought by Jones against Serle in the Exchequer. Jones is entitled to be completely indemnified. He must have the fund out of Court entire; the costs of the issue, and of this application, as well as the costs of the action in the Court of Exchequer, from Regan. Serle has done nothing wrong, but refusing Jones's indemnity, and as a punishment on him for so doing, he loses his costs in the Court of Exchequer; but as to the action which was im-

(a) *Ante*, vol. 2, p. 730.

1841.

JONES

v.
REGAN.

properly brought against him in this Court, by Regan, he ought to be indemnified by the latter down to the time of granting the Interpleader rule, but not as to the costs of this application,

Rule accordingly.

TOPPING v. BROWN.

In order to render the insolvency of a defendant a valid ground for not proceeding to trial, it must be shewn that the knowledge of that fact did not come to the plaintiff before the last step taken by him in the cause.

WHATELY shewed cause against a rule nisi, obtained by *Hayes*, for judgment as in case of a nonsuit. The ground on which the present rule was resisted, was the insolvency of the defendant. The plaintiff, in his affidavit, swore, that the reason why he had not proceeded to trial, was, "that since this action was brought, he has discovered that the defendant is insolvent, and that he verily believes he is so." This, it was submitted, furnished a sufficient answer to the rule, and, therefore, it ought to be discharged, or a stet process entered.

Hayes supported the rule, and contended, that it did not appear from the affidavit sworn by the plaintiff, whether the knowledge of the defendant's insolvency reached him since issue was joined. In order to render it an answer to the rule, it ought to be shewn that the knowledge did not reach the plaintiff before issue joined. Not being shewn that it did not so reach the plaintiff before issue joined, it must be assumed that it did so reach him. If it did, the case of *Mann v. Williamson* (a) was an authority to shew that no sufficient ground was shewn for relieving the plaintiff from the necessity of giving a peremptory undertaking.

COLERIDGE, J.—I think that the affidavit is not sufficient: for, the moment that it is established that the insolvency of the defendant, after the commencement of the action, is an excuse for the plaintiff not proceeding to trial, the meaning

(a) *Ante*, vol. 8, p. 859.

of that must be, that the plaintiff is not to take any step after he has acquired that knowledge ; therefore, the knowledge must be shewn to have reached him after issue joined. If it reached him only after the writ has issued, he would have no right to say that he will take another step after acquiring that knowledge, and then make use of the insolvency as an excuse for not proceeding to trial. The plaintiff, therefore, ought to shew when he acquired his knowledge. If he does not, it must be assumed to have reached him before the last step taken by him. I think the plaintiff must give a peremptory undertaking to try at the Sitings after Trinity Term.

1841.

TOPPING
v.
BROWN.

Rule discharged, on a peremptory undertaking (a).

(a) See *Fisher v. Lediard*, ante, p. 545.

HALLOCK v. The MASTERS and FELLOWS of the
UNIVERSITY of CAMBRIDGE.

(Before the Four Judges.)

PROHIBITION. The declaration stated in substance, that the church of St. Mary, in the town of Cambridge, was a parish church, the greater part of which was occupied by members of the University, but unduly, because, as it was alleged, that they were not parishioners. A faculty was granted in 1738, by the Consistorial Court of Ely, (within which diocese Cambridge was situated), but, as the plaintiffs alleged, illegally, by which a part of the nave, called the Master of Arts' Pit, and the north and south galleries were appropriated to the members of the University. But in 1819, the members of the University were desirous of extending their seats in the gallery, and adding two new parts to the portions already occupied

Where the matter is within the jurisdiction of an Ecclesiastical Court, this Court will not interfere by prohibition, to prevent an adjudication upon it.

The grant of a faculty to appropriate certain parts of a parish church is within the jurisdiction of the Ecclesiastical Court ; and this Court will not presume that that jurisdiction will be improperly exercised, and, therefore, will not prohibit the Ecclesiastical Court from proceeding to judgment, although the faculty prayed for is larger than that Court has power to grant.

1811.

WILSON

v.

FIRTH.

words of the section, in accordance with which the present bond had been given were, "That if any single creditor, or any two or more creditors being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors, whose debt shall amount to 150*l.* or upwards, or any three or more creditors, whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force, respecting bankrupts, shall file an affidavit or affidavits in her Majesty's Courts of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing, requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits, and notice to pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with such two sufficient sureties, as a commissioner of the Court of bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought, according to the practice of such Court, or within such time and in such manner as the said Court, or any judge thereof, shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy, on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader, within two calendar months from the filing of such affidavit or affidavits, but not otherwise." As the bond was to be entered into, to the satisfaction of a commissioner of the Bankrupt Court, according to the pro-

1841.

WILSON
v.
FIRTH.

visions of the section, the application for the purpose of obtaining the delivery up of the bond must be to that Court. [*Coleridge, J.*—Is not the bond satisfied?] Certainly, by the payment of a certain sum to the plaintiff, as a compromise for the debt and costs. But if the sum paid for costs by the defendant, did not satisfy the attorney's claim for costs, in respect of these proceedings, he had a lien on this bond for the residue as against his client, for those costs. But, under any circumstances, this Court had no jurisdiction to order the bond to be delivered up.

Sir F. Pollock. The bond stood in precisely the same situation as bail. If so, the Court had clearly an equitable jurisdiction to interfere in the manner proposed. The question was, whether the defendant should be compelled to go into a Court of Equity, or the Court of Bankruptcy, to have cancelled a security which it was admitted was *functus*. It was a rule in equity, that if a party obtained a security which became *functus*, the party giving it had a right to have it cancelled. Then came the question, whether this Court had the power to do the same thing? By analogy to the interference by the Court, to direct bail-bonds to be delivered up to be cancelled, the Court had clearly such a power.

COLERIDGE, J.—There can be no doubt that that which is required to be done, should be done. The only doubt which I felt, was, whether the Court had such a power as would enable them to do it; or whether that power was confined to the Court of Bankruptcy. It is said, that the power to do so, only belongs to the Court of Bankruptcy; but it seems to me that where that Court has directed the bond to be given, it has done all that it has power to do with it. Many cases may be supposed, in which this Court must exercise a jurisdiction over the bond to determine whether it should be put in suit, or what course ought to be pursued as to it. I think it is much more convenient to hold, that

1841.
 HALLOCK
 v.
 The University
 of
 CAMBRIDGE.

spiritual Court, but the present case depends on one simple fact, which is clearly not within its jurisdiction, namely, that the faculty sought for is a faculty to grant the perpetual use of pews in a parish church to persons who are not parishioners, such as would be a grant to a man and his heirs, and that such a faculty cannot be claimed but by prescription, as to which the Ecclesiastical Court has no authority to examine or adjudge. The same observation applies to the case of *Hall v. Maule* (a). This Court, therefore, will not let the spiritual Court proceed in a suit, relating to a matter which is clearly not within its jurisdiction. It is not enough to say, that the Ecclesiastical Court may pronounce a right judgment; in such a matter, it has no right to pronounce any judgment, and the prohibition must, therefore, issue.

Sir *W. Follett*, in reply. The cases last referred to, are not distinguishable from the present. The Ecclesiastical Court has jurisdiction over the grant of pews in a church, and the Court will not presume that that jurisdiction will be wrongfully exercised.

Cur. adv. vult.

LORD DENMAN, C. J., delivered judgment. In this case more authorities have been cited, and a wider range of argument has been adopted, than the Court, in giving judgment, thinks necessary to notice. It appears, that the faculty prayed in the spiritual Court had two objects; the first was, to confirm the alterations in the church, made at the expense of the University; and the second was, to appropriate to the use of the defendants the alterations thus made. It is not pretended that the grant of a faculty upon the distribution of seats is not, in general, matter of ecclesiastical cognizance, and it is not said, that so far as that object is concerned, there is any objection to the suit in the Ecclesiastical Court. But the objection is to the second

(a) 7 Adol. & Ell. 721; 3 & Nev P. 459.

1841.
 HALLOCK
 v.
 The University
 of
 CAMBRIDGE.

purpose of the suit, which is to appropriate, by a faculty, a part of the church to a corporate body, for a perpetuity, which, it is said, is like granting a pew to a man and his heirs, and is, therefore, bad, as it does not restrict the grant to those heirs while they continue parishioners; and this objection is founded on the principle that a faculty for the occupation of a pew in a parish church, cannot be granted to a person resident out of the parish but by prescription. It is said, that the faculty asked here, is much too large, that consequently it ought not to be granted, and that we ought to interfere, by prohibition, to prevent the Ecclesiastical Court from confirming a faculty thus alleged to be illegal. We think that this application is premature. This Court has not the power to prohibit the Ecclesiastical Court from granting a faculty, which it is not denied, is properly within the limits of its jurisdiction. The suit in that Court must, therefore, be allowed to proceed, and we must wait to see what the Ecclesiastical Court will determine with respect to it. We cannot assume that that Court will not limit the faculty to those objects for which it may be lawfully granted. The case of *Byerley v. Windus*(a), proceeded expressly on that ground. In that case there was a question of fact which could only be properly determined by the verdict of a jury in a Court of law. There was, therefore, a clear want of jurisdiction in that case, as to a point on which, if the Ecclesiastical Court gave any decision, it must partly form that decision. There is nothing of the same sort here. The declaration here does not shew a judicial ground for the grant of a prohibition. The judgment must, therefore, be for the defendants.

Judgment for Defendants (b).

(a) Barn. & C. 1; 7 Dowl. & Ry. 564.

(b) See *Cardew v. Cotley*, ante, vol. 7, p. 666.



1841.

CHAMBERS v. COLEMAN.

It is a sufficient return of a sheriff to a writ of *fi. fa.*, that he has seized goods of the defendant by virtue of several previous writs of *fi. fa.*, "according to their priority."

The sheriff must state some amount as the value of the goods seized, but the omission to do so, is only an irregularity, and therefore, where a return so far defective was made on the 6th of March, it was held too late on the 24th of April following, to object to the return on that ground.

THE SINGER shewed cause against a rule nisi, obtained by *Kelly*, for setting aside the return of the sheriff of Hertfordshire to a writ of *fieri facias*. As a preliminary objection, it was contended, that the application was too late. The return to the writ was made on the 6th of March, and the application to set it aside was not made until the 24th of April, seven weeks afterwards. It was perfectly competent for the plaintiff to apply to a Judge at Chambers during that interval, or during the nine first days of Term. Such laches disentitled the plaintiff to make the present application.

Kelly, in support of the rule, contended, that the return which the sheriff had made in the present case, was not merely an irregular one, but was a nullity. The supposed laches, therefore, suggested, did not waive the objection. The distinction between the effect of delay on instances of irregularities and nullities, was recognised in the cases of *Roberts v. Spurr* (a) and *Garratt v. Hooper* (b). It was there decided, that an irregularity might be waived by the laches of the opposite party, though a nullity could not.

COLERIDGE, J.—You had better proceed to the merits. I will consider that objection.

Thesiger. The return to the writ was in this form:—"I, Robert William Gaussen, Esq., sheriff of the county of Hertford, do hereby certify to our Lady the Queen, that on the 9th day of February, 1841, before the coming to me of the writ of *fieri facias* hereto annexed, a certain writ of *fieri facias* against the goods and chattels of Thomas Coleman, in the writ hereto annexed mentioned, issuing

(a) *Ante*, vol. 3, p. 551.(b) *Ante*, vol. 1, p. 28.

out of the Court of our Lady the Queen, before the Queen herself, was delivered to me, at the suit of Samuel Sharp, indorsed, to levy 254*l.* 5*s.* And that on the 18th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of fieri facias, issuing out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, against the goods and chattels of the said Thomas Coleman, was delivered to me, at the suit of John Gibbons, indorsed, to levy 100*l.* 18*s.* 6*d.* And that on the 19th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of fieri facias, issuing out of the Court of our Lady the Queen, before the Queen herself, against the goods and chattels of the said Thomas Coleman in the writ hereto annexed mentioned, was delivered to me, at the suit of William Cooper, indorsed, to levy 86*l.* And that on the 23rd day of February, 1841, before the coming of the said writ hereto annexed to me, a certain other writ of fieri facias, issuing out of the Court of our Lady the Queen, before the Queen herself, against the goods and chattels of the said Thomas Coleman, was delivered to me, at the suit of Charles Dod the elder, indorsed, to levy 226*l.* 2*s.* 8*d.* And that on the 24th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of fieri facias, issuing out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, against the goods and chattels of the said Thomas Coleman in the writ hereto annexed mentioned, was delivered to me, at the suit of John Samuel Story, indorsed, to levy 29*l.* 2*s.* And that on the same 24th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of fieri facias, issuing out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, against the goods and chattels of the said Thomas Coleman in the writ hereto annexed mentioned, was delivered to me, at the suit of James Thomas, indorsed,

1841.

CHAMBERS

v.

COLEMAN.

1841.
CHAMBERS
v.
COLEMAN.

to levy 276*l.* 19*s.* And that on the 25th day of February, 1841, the said writ hereto annexed, was delivered to me. And I further certify, that *by virtue of the said several writs, and according to the priority thereof*, I have seized certain goods and chattels of the said Thomas Coleman in my bailiwick, the value whereof is to me unknown, and which remain in my hands unsold for want of buyers. Wherefore I cannot have the within mentioned damages, or any part thereof, before our Lady the Queen as I am within commanded. And I further certify to our Lady the Queen, that a fiat in bankruptcy, dated on the 26th day of February, 1841, hath been awarded and issued against the said Thomas Coleman." One objection to the return was, that the sheriff had stated a seizure under more writs than one, instead of stating the seizure to have been made under each particular one according to its priority. This objection was founded on the authority of the case of *Wintle v. Lord Chetwynd* (a). The marginal note to that case was, that "If a sheriff returns to a writ of fieri facias a seizure under that and another writ, it is bad." There, the return of the sheriff was in these terms, "By virtue of this writ, and of another writ of fieri facias, to me delivered prior to the receipt of this writ, I have seized and taken in execution goods and chattels of the within named defendant, which remain in my hands unsold for want of buyers, value uncertain." Mr. Justice *Patteson* there said, "It seems to me, that there is a vice in this return which has not been sufficiently attended to, namely, that the sheriff cannot return that he has seized by virtue of two writs. He cannot do that. It is impossible that he could seize under two, as one of them must have a priority. He ought to state expressly, that he has or has not seized goods under the writ." The rule laid down by Mr. Justice *Patteson* might be admitted as the correct one, but it did not apply to the present case, as here the seizure was stated to have been made under the writs set forth in the return

(a) *Ante*, vol. 7, p. 554.

according to their priority. It could not be said, therefore, that the sheriff had returned a seizure under more writs than one in the manner to which Mr. Justice *Patteson's* remarks referred. The second ground of objection was, that the sheriff had not stated any value of the goods which he returned that he had seized. It was almost impossible for a sheriff, under such circumstances as those which were here disclosed, to state even an approximation to the value of the goods seized. The Court would not, therefore, require him to do that which was, in fact, impossible.

1841.
 CHAMBERS
 v.
 COLEMAN.

Kelly, in support of the rule, contended on the first point, that within the spirit of the case of *Wintle v. Lord Chetwynd*, the return must be considered as insufficient. It did not appear from the return, that the sheriff had seized by virtue of each writ in its order, or whether a seizure had taken place under one writ, and then the other writs had been lodged with him. If the latter was the case, it was an incorrect return, as then the subsequent writs could only operate as a detainer of the goods. As he could not seize under more than one writ at a time, the later writs must be considered as only operating as detainers on the goods. But as the return now stood, it was impossible to ascertain on which of the writs the seizure had taken place, and, therefore, under which of the writs operated as a detainer. To this information the plaintiff was clearly entitled at the hands of the sheriff. If it was sought to bring an action against the sheriff for a false return, it would be impossible for the plaintiff to shew in what respect it was false. Then as to the second objection, that no value of the goods had been stated in the return. Mr. Justice *Patteson*, in the case of *Wintle v. Lord Chetwynd*, already referred to, held, that such an objection was fatal to a return by a sheriff. His Lordship said, "I think this return is bad, on the ground that it does not state the value of the goods seized. Where there are two writs, though the sheriff could not be bound by the precise value which he returns the goods to be of, yet he must make a return

1841.
CHAMBERS
v.
COLEMAN.

as to their value as well as he can." That was a sound principle which was there laid down, as it was required that the sheriff should state about what the amount of the goods seized was, in order that the plaintiff might know what course he ought subsequently to pursue with regard to the defendant. He was entitled to know what was the position of the defendant's estate. The sheriff was not placed in any difficulty by being required to give such information, as he was not bound by the amount which he stated to be the value of the goods which he had seized. The proper fulfilment of the duties of his office required that he should give the best information in his power. In *Mr. Tidd's Practical Forms*, a return of a sheriff under such circumstances, did state an estimated value of the goods seized. According, therefore, to the usual practice, an amount should be stated. On both points, therefore, it was submitted, that the return was a nullity on the face of it, and ought to be set aside. The delay in applying suggested on the other side, could, consequently, have no effect in waiving the right of the plaintiff.

Cur. ado. vult.

COLERIDGE. J.—This was a motion to quash the return made by the Sheriff of Hertfordshire to a writ of fieri facias, on two grounds. The first, that having recited in order a number of writs previously delivered against the same defendant, he had returned a seizure of the defendant's goods and chattels under all of them; the second, that the goods remaining unsold for want of buyers he had returned, that the value of the goods was unknown to him, instead of stating some value, or that they were of the value of the debts or damages to be levied. A preliminary objection to the motion was made on the ground of its lateness; the return being made on the 6th of March, and the plaintiff not having applied to quash it till the 24th of April; and as the term commenced on the 15th of April,

I should certainly hold that the application was made too late, without considering whether it ought not to have been made to a Judge at Chambers in the vacation, if the defects relied on amount only to irregularities. *Mr. Kelly*, for the plaintiff, accordingly contended that they made the return a nullity, and could not be waived. It is necessary, therefore, to consider the nature of these two defects, and in support of the motion as to both, the case of *Wintle v. Lord Chetwynd*, (a) was relied on. The return, there, appears to have been in these words—"By virtue of this writ, and of another writ of fieri facias to me delivered, prior to the receipt of this writ, I have seized, and taken in execution, goods and chattels of the within named defendant, which remain in my hands unsold for want of buyers; value uncertain." *Patteson*, J. is reported to have said—"the sheriff cannot return that he has seized goods by virtue of two writs. He cannot do that. It is impossible that he can seize under two, as one of them must have a priority. He ought to state expressly that he has or has not seized goods under the writ." Before I make any observation on these words, I should state that the return, which the Court has now before it, varies from that in the case cited; each prior writ is stated in order, and it details the dates of delivery, the amount to be levied, the names of the plaintiff in each action; and then, after stating the delivery of the writ in question, the sheriff returns, that "by virtue of the said several writs, and according to the priority thereof, I have seized," &c. The sheriff, therefore, in this case has expressly stated a seizure of goods under each and all of the writs, and has added that he has made such seizures according to the priority of the several writs. Now, where a sheriff is in possession of goods under a fieri facias, the legal effect of the delivery to him of a second writ is, that the goods are bound by it from the day of delivery, subject to the first, and that without warrant or

1841.

CHAMBERS
v.
COLEMAN.

(a) *Ante*, vol. 7, p. 554.

1811.
CHAMBERS
v.
COLEMAN.

further actual seizure; and supposing the value of the goods be only equal to cover the amount to be levied under the first writ, yet if that writ be set aside, a return of nulla bona to the second would be a false return. Whether it is strictly correct to call such legal effect a seizure, is, perhaps, not material to determine in the present case, because, at all events, it is but an error in language, which would not make the return a nullity. But I may say, in passing, that it seems difficult to find a better term for it. The sheriff means to say, that, by law, he is in possession of the goods under the second writ as well as under the first; and how does he acquire possession but by seizure actual, or in legal contemplation? Suppose a single chattel seized, of the value of 100*l.*, under a writ endorsed to levy 30*l.*, and then a second and third writ to come, each endorsed to levy 30*l.* more, why may not the sheriff be reasonably said to seize the chattel under the later writs, according to their priority in respect of the value beyond that to be levied under the first? I have thought it right to confer with my Brother *Patteson* upon this matter, and he authorizes me to say, that he thinks the language attributed to him in *Wintle v. Lord Chetwynd*, somewhat too strong and unqualified; as he took occasion to say when it was cited last Term in the full Court. It remains to consider the second objection, and I conceive it to be clear that the sheriff ought, in all cases to return some value to the goods seized. The case cited is an authority for the necessity of his doing so where there are more writs than one; but the reason applies universally. He will not be strictly bound by the value he returns, but he should form the best estimate he can, and thereby afford the plaintiff the information he has a right to have, in order to determine his future proceedings. Still the question remains, whether the neglect to do this makes the whole return a nullity? It is by no means easy to lay down any one rule, whereby to distinguish between an irregularity, and that which makes a proceeding a nullity. *Mr. Tidd* defines an irregularity to be, "the want of adherence to some prescribed rule or mode of pro-

ceeding." And he says, "it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner" (a). A defect is supposed, but one that does not take away the foundation or authority for the proceeding, or apply to its whole operation. The present case appears to me to fall within this line; the return contains all essentials, but it does not give the plaintiff that full information as to one point which it ought; and if he had applied in time, he might have set it aside for that reason, and procured a better; but, as it is, it cannot be said to be no return. The rule, therefore, must be discharged, and being moved on the ground of an irregularity, with costs.

1841.

CHAMBERS

v.

COLEMAN.

Rule discharged with costs.

(a) P. 512, 9th edit.

ARBOURN v. ANDERSON.

(Before the Four Judges.)

ASSUMPSIT. The plaintiff declared that one Rogers, on the 25th day of January, 1839, drew a bill of exchange on the defendant, for the sum of 250*l*. payable to the order of the drawer, three months after the date thereof; that Rogers indorsed to one Mansell, and the said Mansell then indorsed the same to the plaintiff. The defendant pleaded that the bill was given for the accommodation of Mansell, and, without any consideration or value, drawn and indorsed by Rogers, and also accepted by the defendant, as in the declaration mentioned; and that there never was any con-

In an action on a bill of exchange, alleged in the declaration to have been indorsed by M. to the plaintiff, the defendant pleaded that the bill was drawn and accepted without value, and that there never was any consideration for indorsing the bill by any of

the parties, nor for the indorsement by M., nor for M. paying the amount: Replication, that the indorsement by M. was in blank, and that R. who appeared to be, and plaintiff believed to be, the lawful holder of the bill, indorsed the same to plaintiff, for value, to wit, &c. Special demurrer, for want of stating consideration for the drawing or accepting of the bill, and for departure as to the allegation of the indorsement to the plaintiff: *Held*, that the replication was good, as the plaintiff, against whom there was no allegation of fraud, sufficiently set up his own title by alleging an indorsement to him for value by a person whom he believed to be the lawful holder of the bill.

1841.

ARBOURN
v.
ANDERSON.

sideration or value whatever, either for the drawing or indorsing of the bill by Rogers, or for the accepting thereof by the defendant, or for Rogers or either of them, paying the amount of the bill, or any part thereof; and that there never was any consideration or value whatever for the said indorsement, by Mansell, of the bill, or for Mansell paying the amount of the bill, or any part thereof. Verification.

Replication. That the indorsement by Mansell was an indorsement in blank, and not a full or special indorsement, ordering the said sum of money in the said bill mentioned, to be paid to any particular person or persons, or to his, her, or their order or otherwise; and that after the indorsement by Mansell, and before the bill became due, certain persons, to wit, Messrs. Reay, who then appeared to be, and whom the plaintiff then believed to be, the lawful holders of the said bill, and entitled thereto, delivered the same to the plaintiff, with the said indorsements of Rogers and Mansell thereon, upon and for a good and sufficient consideration, and for value, to wit, for the amount of the bill, and the plaintiff then took and received the same for such good and sufficient consideration, and without notice of the said premises in the plea mentioned.

Special demurrer. The causes assigned were that the last-mentioned replication neither traverses or denies, nor confesses and avoids the said fourth plea, inasmuch as the defendant hath, in that plea, alleged that there never was any consideration or value whatever, for the said acceptance, or either of the indorsements, or for the defendant, Rogers and Mansell, or any of such persons paying the amount of the bill, or any part thereof, and the replication does not shew that there ever was any value or consideration for either of the indorsements, or for any or either of these three persons paying the bill. That the replication does not shew that there was any consideration for the delivery of the bill by Messrs. Reay to the plaintiff, or what was the consideration or the nature of it, or how or by whom the amount of the said bill, which is said to be the consideration

for such delivery, was paid, or in what manner such amount was a consideration for such delivery. That the replication neither denies, nor confesses and avoids the fourth plea, nor anything therein alleged. That the replication does not allege that Messrs. Reay were holders or proprietors of or entitled to the bill of exchange, but only alleges that they appeared, and the plaintiff believes them to be the lawful holders of the bill, and entitled thereto, which is not a sufficient or proper averment, that the said Messrs. Reay were the lawful holders of the said bill, &c. and no good or efficient, or proper issue can be taken thereon. That Messrs. Reay not appearing to be parties to the said bill, their delivery of it to the plaintiff, will not enable him to maintain the action. That it does not appear in the replication that there was any consideration for the acceptance or indorsements in the bill, or for the defendant's paying that sum, &c. That the fact of a consideration passing between persons not parties to the bill, would not entitle the plaintiff to maintain this action. That the replication is a departure from the declaration, for that the declaration alleges an indorsement to the plaintiff, from Mansell, and the replication alleges the indorsement from Messrs. Reay. And also for that the plaintiff claims in the declaration as indorsee of Mansell, and the replication sets forth a different title. That the replication is a departure, for that it sets forth different causes of action from those stated in the declaration. That the consideration in the replication mentioned, might be sufficient for the indorsement by Messrs. Reay, but could not have been a consideration for the acceptance or the indorsements in the declaration mentioned, the acceptance and indorsements being prior, &c. ; and that the replication was argumentative, &c. Joinder in demurrer.

Gunning, in support of the demurrer. The replication shews no title in the plaintiff. The declaration states that Rogers, the payee of the bill, indorsed to one Mansell, and that Mansell indorsed to the plaintiff. The defendant, by

1841.

ARBOURN

v.

ANDERSON.

1841.
 ARBOURN
 v.
 ANDERSON.

his plea alleges, that there was not, at any time, any consideration or value for the drawing or accepting of the bill, or for either of the indorsements set forth in the declaration; and in order to enable the plaintiff to recover on a bill so circumstanced, the plaintiff must shew, that he gave value for it to some person entitled to indorse or deliver it to him. It may be admitted, that any lawful holder of a bill, payable to order, may confer a title by delivery, for value; but this replication does not state that Reay and Co., were such holders. It alleges only, that they appeared to be, and were believed by the plaintiff to be the lawful holders, which, at most, amounts to only an argumentative allegation that they were so. No material issue can be taken on such an allegation as the present, and if found for either party, it would be utterly immaterial. [Mr. Justice *Patteson*.—Is the plea good? It does not allege that the plaintiff gave no consideration, but only that Rogers and Mansell received none, which may well be, and yet those persons may have indorsed it without consideration, to one to whom the plaintiff gave value.] No objection is made to the plea in the margin of the demurrer books, and the plaintiff, therefore, cannot raise that point. But the plea would be good on general demurrer, as it is consistent with the allegation in the declaration that the indorsement by Mansell might have been a special indorsement to the plaintiff, and the plea alleges that there was no consideration for the “said indorsement.”

Mellor contra, was stopped.

LORD DENMAN, C. J.—This is not a usual form of pleading but I am not prepared to say that it is improper. The replication states that Messrs. Reay delivered the bill to the plaintiff, on and for a good consideration, and that he received the same for such good consideration, and without notice of the premises in the third plea mentioned.

PATTESON, J.—This seems to me to be a good replication,

by way of confession and avoidance. The plea may be sufficient on a general demurrer. Whether it would be on a special demurrer, I will not say, for it is not necessary to determine that question now. The plea states that the bill was drawn by Rogers on, and accepted by, the defendant, and was indorsed by Rogers to a person named Mansell, and that he indorsed the bill without good and sufficient consideration, but there it stops. Now it does not go on to say to whom Mansell indorsed the bill, or whether, after such indorsement, it was stolen from Mansell, or was lost by Mansell, but merely that he indorsed it. Then as the plaintiff might not have taken it immediately from Mansell, I do not see how he could traverse in his replication the facts stated in the plea, or do more than reply what he has done, unless he actually knew that the person who got it from Mansell, did so get it for a good consideration. What he says, admits that it may not have been obtained for a good consideration from Mansell, but that it was indorsed in blank by him, and that it got into the hands of Reay and Co., and then that it was delivered by them to him for a good consideration. What is there to prevent the defendant from shewing that it did not come properly into the hands of Reay and Co., and that that fact was known to the plaintiff? That might be shewn if true. The only thing that made me entertain some doubts on the case, in the course of the argument, was, whether it was sufficiently alleged that Reay and Co. were the holders of the bill; but I do not see how the plaintiff could have stated more than that Reay and Co. appeared to be, and were believed by him to be the lawful holders of the bill. As the pleadings now stand, he was not bound to state that they were the lawful holders. He has stated that they appeared to be the holders, and that he received it from them for a good consideration. That is sufficient.

WILLIAMS, J., concurred.

1841.

ARBOURN
v.
ANDERSON.

1841.
 ARBOURN
 v.
 ANDERSON.

WIGHTMAN, J.—The plea is bad on special demurrer, and I doubt whether it would not be bad on general demurrer. It sets up circumstances, which shew that there could not have been a good consideration for Mansell passing away the bill. But that does not necessarily affect the plaintiff's title, and the fact is admitted on the face of the replication, which then, however, introduces a new state of facts, that furnish a good cause of action.

Judgment for the Plaintiff.

REGINA v. TAYLOR.

Where an indictment at common law for disobeying an order of sessions, made pursuant to 4 & 5 Wm. 4. c. 76, ss. 72, 73, for the maintenance of a bastard child, was defective, but only on points which would render it bad on demurrer, the Court refused to interfere by quashing it.

PICKERING shewed cause against a rule nisi, obtained by *Pashley*, to quash an indictment against the defendant for not obeying an order of Quarter Sessions, to pay certain sums for the expenses and maintenance of a bastard child. The defendant had not pleaded, and the indictment was removed by the prosecutors, by writ of certiorari, into this Court. The indictment was in the following form.

West Riding of Yorkshire to wit.	}	THE Jurors for our Lady the Queen upon their oath present, that Hannah Simeon, of the Township of Lindley, in the West Riding of the said County of York, single- woman, before the making of the Order of the Court of General Quarter Sessions of the Peace, hereinafter men- tioned, to wit, on the 24th day of December, A. D. 1834, at the said Township of Lindley, in the West Riding of the County aforesaid, was delivered of a living female bastard child. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Hannah Simeon having such bastard child as aforesaid, on the day and year afore- said, became and was poor and impotent, and not able to provide for the maintenance of her said bastard child; and that the said bastard child became and was then, to wit, on
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the day and year aforesaid, chargeable to the township of Lindley aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the churchwardens and overseers of the poor of the township of Lindley, in the West Riding aforesaid, did, at the Michaelmas General Quarter Sessions of the peace of our Lady the Queen, holden by adjournment at Leeds, in and for the said West Riding, on Wednesday, the 21st day of October, A. D. 1835, before James Rhodes, clerk; chairman, William Prest, Esq., and others, their fellow justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen in the said riding, and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed within the riding aforesaid; the said General Quarter Sessions of the peace to be holden as aforesaid, being the next General Quarter Sessions of the peace within the jurisdiction of which the said township of Lindley was then, to wit, on the 24th day of December, 1834, and from thence hitherto has been and now is situate, after the said bastard child had so become chargeable as aforesaid, apply for an order upon William Taylor, of the said township of Lindley, in the said riding, labourer, whom they, the said churchwarden and overseers did then, to wit, at the said General Quarter Sessions of the peace so holden as aforesaid, charge with being the putative father of the said bastard child, to reimburse the said township of Lindley, in the said riding, for its maintenance and support. And the jurors aforesaid, upon their oath aforesaid, do further present, that before the hearing of the said application of the said churchwardens and overseers, at the said General Quarter sessions of the peace so holden as aforesaid, fourteen days' notice was given under the hands of the said churchwardens and overseers to the said William Taylor, so intended to be charged with being the father of the said bastard child, of the said intended application as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that upon the hearing of the said application

1841.

REGINA

v.

TAYLOR.

1841.

REGINA
v.
TAYLOR.

of the said churchwarden, and overseers, it did appear to the said General Court of Quarter Sessions of the peace, so holden as aforesaid, that the said bastard child was lately, that is to say on the day and year last aforesaid, born in the said township of Lindley, on the body of the said Hannah Simeon ; and that the said child had, by reason of the inability of the said Hannah Simeon, the said mother of the said child, to provide for the maintenance of the said child, become chargeable to the said township of Lindley. And the jurors aforesaid, upon their oaths aforesaid, do further present, that it did further appear to the said Court upon hearing of the said application, and upon the evidence of the said Hannah Simeon, the said mother of the said child, such evidence being corroborated in a material particular by other testimony to the satisfaction of the said Court, as is required by law, that the said William Taylor was really and in truth the father of the said bastard child. Whereupon the said Court did declare and adjudge, that the said William Taylor now and is the father of the said bastard child ; *and the said Court did thereupon order, that the said William Taylor should forthwith pay or cause to be paid to the said churchwarden and overseers of the poor of the said township of Lindley, the sum of 12s. 6d., to reimburse the said township of Lindley the actual expense incurred in the maintenance of and support of the said bastard child, from the time of its birth as aforesaid, to the time of the making of the said order ; and should also weekly and every week from the said date of the said order, and so long as the said bastard child should be chargeable to the said township of Lindley, and until the said bastard child should attain the age of seven years, if she should so long live, pay or cause to be paid unto the said churchwarden, and overseers of the poor of the said township of Lindley, the sum of two shillings, to reimburse the said township of Lindley the actual expense to be incurred in the maintenance and support of the said bastard child.* And the jurors aforesaid, on their oath aforesaid, do further present

that after the making of the said order, to wit, on the said 21st day of October, A. D. 1835, at the township of Lindley aforesaid, notice of the said order was duly given to the said William Taylor, and he, the said William Taylor, was then and there duly made acquainted with the contents thereof. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said bastard child, at the time of the committing by the said William Taylor, the contempt and disobedience hereinafter mentioned, was and now is living, and hath always, from the time of the making of such order, and from thence continually till the making of this inquisition, been and continued and now is chargeable to the said township of Lindley; and that the said child is under seven years of age, and that before and at the time of the making of the said order, and from thence continually till the taking of this inquisition, one John Sykes was and still is churchwarden of the said township of Lindley, duly constituted; and one Joseph Sykes, and one George Crossland were and still are overseers of the poor of the said township of Lindley, duly constituted, of which he the said William Taylor aforesaid, to wit, on the 21st day of October, A. D. 1835, had due notice, to wit, at the said township of Lindley. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Taylor, not regarding the said order, nor the laws and statutes in such case made and provided, did not, upon the said notice of the said order so given to him as aforesaid, forthwith pay or cause to be paid the said sum of 12s. 6d. to the said churchwarden and overseers of the poor of the said township of Lindley, and did not weekly and every week from the date of the said order, and so long as the said bastard child was chargeable to the said township of Lindley, and until the said bastard child should attain the age of seven years, pay or cause to be paid to the said churchwarden and overseers of the poor of the said township of Lindley, the said sum of two shillings, although so to do, he, the said William Taylor was afterwards, to wit,

1841.

REGINA

v.

TAYLOR.

1841.
REGINA
v.
TAYLOR.

on the 21st day of October, A. D. 1835, and often, both before and afterwards, to wit, at the said township of Lindley, duly requested by the said John Sykes, so being such churchwarden, and by the said Joseph Sykes and George Crossland, so being such overseers as aforesaid. But on the contrary thereof, he the said William Taylor, on and from the said time of the said order, to wit, on and from the 21st day of October 1835, and on and from the time of the said notice of such order, so given to him, the said William Taylor as aforesaid, to wit, on the day and year last aforesaid, until the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously, hath neglected and refused to pay or cause to be paid to the said churchwarden and overseers of the poor of the said township of Lindley, the said sum of 12*s.* 6*d.*, so by him to be paid as aforesaid, as also the said sum of 2*s.*, so by him to be paid as aforesaid, weekly and every week from the said time of the making of the said order, hitherto contrary to the direction of the said order, and in manifest breach and contempt of the same, to the present damage of the inhabitants of the said township of Lindley, to the evil example of all others, *and against the peace of our Lady, the Queen, her crown, and dignity.*

In moving for the rule, it had been admitted by *Pashley*, that the grounds on which he applied, were such as did not entitle him to have the indictment quashed *ex debito justitiæ*; but that the question was for the discretion of the Court, and if it was clear that no judgment could be pronounced on the indictment, supposing the defendant to be convicted, the Court would quash it. The objections to the indictment were, first, that the indictment shewed an excess of jurisdiction by the Quarter Sessions, in making the order alleged to have been disobeyed. Secondly, that the conclusion, "against the peace of our Lady the Queen," was insufficient, the offence being charged to have been committed partly, if not wholly, in the reign of another sovereign. Thirdly, that the indictment contained no such averment of *venue* to any of the facts alleged

1841.

REGINA
v.
TAYLOR.

as constituting the offence as was required by law. As to the first objection, if the words of the statute were examined, and the ordinary intendments applied to the indictment, it would be clear that no excess of jurisdiction was shewn on the face of it. The words of the 4 & 5 Wm. 4, c. 76, s. 72, were, "that the Court to which such application should be made, shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is really, and in truth, the father of such child, it shall make such order upon such person in that respect as to such Court shall appear to be just and reasonable under all the circumstances of the case." Then by a proviso in sect. 73, it was further enacted, "Provided always, that whenever such application shall be heard, the costs of the maintenance of such bastard child, shall, in case the Court shall think fit to make an order thereon, be calculated from the birth of such bastard child, if such birth shall have taken place within six calendar months previous to such application being heard, but if such birth shall have taken place more than six calendar months previous to such application being heard, then from the day of the commencement of six calendar months next preceding the hearing of such application." The justices, therefore, had only power to make an order for expenses incurred during six months; but the suggested objection was, that if the date of the birth was considered, it would appear that the sum of 12*s.* 6*d.* might be for expenses incurred during a period of nine months. If the date of the birth was considered as material, this might be so. But it was submitted, that the date of the birth was not material, and that without a contrary allegation, it must be assumed, that the expenses had been incurred within six months. Then with respect to ordering the payment of two shillings a-week, it must be intended that the sum so ordered, was for such a sum as the parish should incur by the chargeability of the child. The case of *Rex v. Stevens and Agnew (a)*, was an authority to shew that if sense could be made of the

(a) 5 East, 244.

1841.

REGINA
v.
TAYLOR.

indictment on looking at it altogether, the Court would do so. In that case it was held, that the word "until" might be construed either as exclusive or inclusive of the day to which it applied, according to the context and subject matter. The date of the birth could only be considered as mere inducement, and, therefore could not affect the validity of the indictment in the present case. The Court would only entertain an application to quash on such a ground as the objection to the date, where the date was of the essence of the offence. That was clearly not so in the present case. The other two grounds were clearly only objections available on demurrer, and, therefore, not sufficient to justify the Court in quashing the indictment. The Court would not, therefore, on the grounds stated, quash the present indictment.

Pashley, contra. The indictment charged, that the Court of Quarter Sessions did declare and adjudge that the defendant should forthwith pay to the churchwarden and overseers of the poor of the township of Lindley, "the sum of 12*s.* 6*d.*, to reimburse the said township of Lindley the actual expense incurred in the maintenance and support of the said bastard child *from the time of its birth, as aforesaid, to the time of making the said order*, and should also weekly, and every week, from the date of the said order, and so long as the said bastard child should continue *chargeable* to the said township of Lindley, and until the said bastard child should attain the age of seven years, if she should so long live, pay to the churchwarden and overseers of the township of Lindley the sum of 2*s.*, to reimburse the said township the actual expense to be incurred in the maintenance and support of the said bastard child." The objection to the order as set out, which shewed the jurisdiction of the sessions to have been exceeded, was twofold. First, the total sum, 12*s.* 6*d.*, was fixed as the *actual expense* incurred in the maintenance and support of the bastard during nearly *nine months* before the date of the order, the birth being averred to have taken place on the 24th of December, 1834, and the order to have been made on the

1841.

REGINA

v.
TAYLOR.

21st of October, 1835. The words of the 4 & 5 Wm. 4, c. 76, s. 73, conferred certain powers on the justices in Quarter Sessions, and those had clearly been exceeded in the present case. They had ascertained the expenses incurred during nine months; it might even be, that all those expenses were incurred during the first three months after the birth. It was not contended, that there should have been an express averment of the 12s. 6d. being the expense of maintenance during the term of *six months* before the making of the order. The objection was, that it was expressly averred to have been for those expenses during the whole period, from the 24th of December, 1834, to the 21st of October, 1835. It was as if in an indictment for murder, the allegation of time with the mortal stroke being the 1st of January, in the third year of her Majesty's reign, the death were averred to have happened on the 1st of February in the following year. Such an indictment would be bad, although it was quite clear that an express averment of the death having occurred within the year, and a day was never necessary. Next as to the order to pay 2s. weekly. It was an absolute and unqualified order to pay that sum for every week during which the child should be *chargeable*. The chargeability might continue throughout the whole seven years, and yet never amount to so much as 2s. in any one week. The contribution of one farthing weekly by the township towards the maintenance of the child, would constitute chargeability, and render the defendant liable to pay 2s. weekly; whereas the Act clearly meant to restrict the power which justices previously possessed, and to render the supposed father liable, to pay only the *actual* expenses incurred. If this order was good, an order that a supposed father of a bastard child should pay 20l. a-week instead of 2s., would be equally good. Under the old law such an order was good, the amount being then wholly in the discretion of the justices. This was precisely what the 4 & 5 Wm. 4, c. 76, was intended to remedy. The order ought to have been "to pay weekly, &c., such sum

1841.

REGINA

v.

TAYLOR.

and sums of money as shall be weekly expended by or on behalf of the said township for the maintenance and support of the said child not exceeding 2s. in each week." No decision had occurred putting a construction on the section, but the forms of such orders given in *Archbold's Poor Law Amendment Act*, p. 28, in *Chitty's Burn's Justice*, vol. 1, p. 384, and that used in the case of *Regina v. Lewis(a)*, were all, as it was contended, the present order ought to be. The second objection was equally fatal. The offence charged on the face of the indictment was committed in the reign of one sovereign, and the conclusion of the indictment was "against the peace of another." The authorities were quite decisive to shew this objection to be fatal. They were equally so, if it was considered that the offence was charged to have been committed, not in the first reign only, but in both reigns. [*Wightman, J.*—Is not this objection cured by the recent statute, the 7 Geo. 4, c. 64?] No; the statute only cured such objections when made after plea. Here, the defendant had not pleaded, and might demur, in which case this objection must be fatal. [*Wightman, J.*—This is an application to the discretion of the Court, and I should only quash the indictment, on motion, for such a defect as would prevent a judgment being given upon it after verdict.] *Pashley* then abandoned this point. Thirdly, There was no sufficient allegation of venue given in the statement of any one of the facts charged as constituting the offence. The cases of mere nonfeasance mentioned were very different. Here was a charge of wilful neglect and *refusal*. The charge of refusal to obey the order is averred without any allegation of place whatever, and the indictment would be insufficient without such averment of the defendant's refusal. With the previous loose and insufficient statement of a request, the words "at the township of Lindley, aforesaid," are, it was true, used; but that request alone would not be sufficient, even if properly laid, and as it was laid, it

(a) 8 A. & E. 881.

1841.

REGINA
v.
TAYLOR.

did not shew the offence to have been committed within the West Riding of Yorkshire, to which the jurisdiction of the Court of Quarter Sessions was confined. It was consistent with the whole of this indictment that Lindley was partly in any one of the counties adjacent to the West Riding, and partly in that Riding. Authorities need not be cited to shew that every fact material to constitute the offence must be laid with place and time. Per *Buller*, J., in *Rex v. Hollond* (a); so also *Hawkins*, 2 P. C. B. 2, c. 25, s. 83. The case of *Rex v. Burridge* (b) was precisely in point. The charge there was, that Burridge feloniously assisted one Palmer to escape from Ilchester gaol. It was laid in the indictment, that Palmer was committed to gaol "at Ivelchester, in the said county," and that, afterwards, to wit, on such a day, Burridge, "at Ivelchester, aforesaid," feloniously aided and assisted Palmer to escape out of the said gaol. In the judgment of the Court of Queen's Bench, delivered by Lord Hardwicke, C. J., it is said (c), the aid and assistance might be afforded in a different county, and we cannot take notice, that the whole township or vill of Ivelchester is in the county of Somerset. This case was cited, with others, by Mr. Serjeant Williams, in a learned note to *Rex v. Kilderby* (d). On these grounds, no valid judgment could be given on the indictment, should the defendant plead, and the verdict pass against him; and, therefore, it would be better for all parties that it should be quashed now, than that the prosecution should proceed and end in judgment being arrested.

WIGHTMAN, J.—I think that the best ground of objection is with respect to the 12s. 6d.: I think that the indictment is defective as to that; but I doubt that I ought to interfere. The rule laid down by Mr. *Archbold's Criminal Pleading*, p. 63, 8th edit., is, that "where an indictment is

(a) 5 T. R. 620.

(b) 3 P. Wms. 439.

(c) *Ib.* p. 496.(d) 1 Wms. Saund. 308 (a)
note (1).

1841.

REGINA
v.
TAYLOR.

so defective that no judgment can be given upon it, even should the defendant be convicted, the Court, upon application, will in general quash it." I am, however, by no means sure that those objections are available, except on demurrer.

Cur. adv. vult.

COLERIDGE, J., on a subsequent day stated, that Mr. Justice *Wightman* had considered the case, and was of opinion, that although the objections taken to the indictment might make it bad on demurrer, he thought he ought not to interfere by quashing the indictment.

Application refused (a).

(a) See *Regina v. The Justices of Hampshire*, ante, p. 171.

WARD v. HALL.

An arbitrator, to whom a cause, in which several issues were joined, was referred, the costs to abide the event, disposed of each issue, and then, although no power for that purpose was given to him, awarded a *stet processus*:
Held, that although this was an excess of authority, the award was only bad as to that part, and good as to the rest, and the parties might proceed to tax their costs on it.

MELLOR moved for a rule, to shew cause why an award should not be set aside, on the ground that the arbitrator had exceeded his authority. It was an action of detinue, for detaining a variety of deeds relating to different estates. The defendant was an attorney, and pleaded, first, non detinet; secondly, that the plaintiff was not possessed of the deeds in question; thirdly, a lien on the deeds, as an attorney; fourthly, as to certain of the deeds relating to the Belton estate, a deposit of them as a security for advances made beyond the amount of 1,500*l.* to the plaintiff; fifthly, as to another part of the deeds, a deposit of them as a security for the purchase-money of a certain estate; sixthly, leave and license. A variety of issues were taken on these pleas. When the cause came on for trial, it was referred, on the usual terms, that the costs of the cause should abide

the event, the costs of the reference and the award to be in the discretion of the arbitrator. The arbitrator having entered on the reference found on all the issues, and then proceeded to award a stet processus, by directing, "that no further proceedings shall be taken in the said action." No such power was vested in him by the order of reference, and, therefore, he had exceeded his authority. This direction was inconsistent with the terms of the order of reference, as it was provided by them, that the costs of the reference and award should abide "the event," but a stet processus was no event, at least no legal event; but as long as this award existed, the Master could not proceed to tax the costs of the arbitration and award. It could not be said, that merely awarding on the issues amounted to an "event," for some of them were decided in favour of the plaintiff, and some in favour of the defendant. *Duckworth v. Harrison (a)*, *In the Matter of Leeming and Fearnley (b)*.

1841.

WARD
v.
HALL.

COLERIDGE, J.—It seems to me that I ought not to grant this rule. The motion is made to set aside the award, on the ground that the arbitrator has exceeded his authority. It seems that the cause was referred to him, and the costs of the cause were to abide the event, and the costs of the arbitration and the award were to be in his discretion. It was an action of detinue. There were several pleas, and he has found on the issue raised on every one. That is an event to the cause. It would have been an excess of authority, if he had gone on to give it a more legal form of event. The costs being to abide the event, there is no foundation for the suggestion, that there is a difficulty in taxing the costs. It is not objected that he has not found on each particular issue, and, therefore, the duty of the Master will be perfectly easy to proceed to the decision as to the costs. But then it is said, that the arbitrator has exceeded his authority, by saying that there shall be no further proceed-

(a) *Ante*, vol. 7, p. 71.

(b) 5 B. & Ad. 403.

1841.

WARD

v.
HALL.

ings. By so saying he certainly did so far exceed his authority. But this is an instance, in which the excess of authority may be separated, and the rest of the award left to take effect. It seems to me that this is only an objection pro tanto, and which may be separated from the other part of the award. In my opinion, therefore, both parties are at liberty to proceed to taxation before the Master.

Rule refused.

DOE dem. TURNER v. GEE.

Where a party is served as tenant in possession, and he swears that he is under lessee of the premises sought to be recovered, the Court will not set aside an appearance entered by him on a suggestion by the lessor of the plaintiff, that the tenant has no interest in the premises.

BAYLEY shewed cause against a rule nisi, obtained by *Whateley*, calling on Gee, the defendant, to shew cause why the appearance entered by him should not be set aside, unless two persons, named Clarke and Burdon, would come in and defend the action. It appeared from the affidavits, that it had been agreed between the lessor of the plaintiff and a person named Clarke, that the latter should become the lessee of two houses belonging to the former, after certain repairs had been done; that the lease should contain covenants to repair, to insure, and not to underlet. There was also to be a clause of re-entry, in case of a breach of any of the covenants. It was agreed that the intended lessee should hold, on the terms of the lease, until that instrument could be executed. The repairs covenanted for not being done, the present action of ejectment was brought, on the clause of re-entry, to recover possession of the two houses. The declaration was served on Gee, who was tenant of one of the houses, and afterwards on him as for Clarke. Gee accordingly entered into the consent rule and appeared. No service, however, was effected on Clarke in any other way. It was sworn, in support of the application, that Gee had no interest in the premises, and, therefore, that he had no right to appear and defend the action. In answer to the appli-

cation it was sworn, that Clarke had underlet one of the houses to Haddon, who underlet it to Burdon, who again underlet it to Gee; and Gee now swore that the premises were thus underlet to him, and that he was tenant in possession. With respect to the other house, he laid no claim to defend as to that. Turner, the lessor of the plaintiff, having served Gee as tenant in possession, and the latter swearing that he took an interest in the premises, it was perfectly regular for him to enter an appearance and defend the action. It was not competent for the Court to try, on affidavits, the merits of the respective claimants to this house. Under these circumstances, the Court would discharge the rule.

1841.
 Doe dem.
 TURNER
 v.
 GEE.

Whateley, in support of the rule, contended that the statements made in the affidavits, in answer to this application, only shewed a colourable defence on the part of Gee, and that it was evident he was the mere instrument of Clarke or Burdon. The Court would not, therefore, allow him to continue his appearance and defend the action.

COLERIDGE, J.—The difficulty I feel is, as to the service of the declaration in ejectment.

Cur. adv. vult.

COLERIDGE, J.—This was a rule to set aside the appearance of the defendant, with costs, unless two persons, named Clarke and Burdon, would come in and defend the action. The facts of the case were, that Turner had demised to Clarke, by an agreement under seal, some premises, which consisted of two houses. A lease was to be granted after certain repairs were done; and it was to contain certain covenants; namely, to repair, to insure, and not to underlet. There was a clause of re-entry for breach of covenants, and Clarke was to hold the premises, on the terms of the lease, until it was executed. The repairs, it appears, were not done, and this ejectment was brought for breach of cove-

1841.

Doe dem.

TURNER

v.

GEE.

nants in the agreement. Gee was found in possession of part of the premises, and was served with the declaration, as tenant in possession; but whether as tenant of the whole, or of part only, does not clearly appear, but it would rather seem, of the whole. However, a declaration was afterwards served on him, as for Clarke; but then, there has been no good service on Clarke. Clarke, it appears, had underlet one of the houses to Haddon. Haddon had underlet it to Burdon, and he again had underlet it to Gee; and Gee swears, that he now holds as undertenant. Now, as Turner has served him with the declaration as tenant in possession; and he swears that he holds under an assignment, I cannot try the merits of this ejectment on affidavits, and, therefore, I cannot set aside his appearance. But then, it appears on Gee's own affidavit, that he has no claim as to the other house; therefore, as to that house, the rule may be made absolute, unless Clarke will come in and defend. No costs can be allowed on either side.

Rule absolute accordingly (a).

(a) See *Doe d. Wright v. Smith*, d. *Jones v. Shenton*, 10 Barn. & ante, vol. 8, p. 517; *Thrustout* Cress. 110; 5 Man. & Ry. 443.

Ex parte PARKES.

A mandamus to a Railway Company, commanding them to summon a jury to assess compensation to a claimant will not be granted, where it appears that the works calculated to damnify the claimant, are still bonâ fide proceeding, although the applicant also claims for land taken by the Company, and considerable delay has taken place since the commencement of the works.

CHILTON moved for a rule, to shew cause why a writ of mandamus should not issue, directed to the Birmingham and Gloucester Railway Company, commanding them to summon a jury, and assess compensation to the applicant, Mr. Parkes, for the value of his land, and the injuries which were sustained by his property, in consequence of the works of the Company. The Company had given, in

the Company had given, in

1841.

Ex parte
PARKES.

March, 1839, the notice required by their private act, that they should require certain property belonging to Mr. Parkes, for the purposes of the railway. On the 4th May, in the same year, the first claim to compensation was made. On the 2nd June, Mr. Parkes was informed that the Company's works were not yet completed, and therefore his compensation could not be completely assessed. A variety of applications had been since made to the Company for compensation, and a similar answer given. The works of the Company were from time to time discontinued. At length, on the 11th January, 1841, the usual indemnity bond against costs, was given by Mr. Parkes to the Company; and on the 16th February, a notice was served on the Company, to summon a jury, to assess the amount of the claimant's compensation. On the 17th of that month, the agent of the Company informed Mr. Parkes, that they were about to dig still lower in the street wherein the property in question was situated; that the work so done would affect his property still more; and that then one jury might assess the amount of the value of the land, and the compensation to be made for the injury done. Since that time, the Company had dug lower, and were still digging. The question was, whether this conduct did not in fact amount to a virtual refusal, if not to a formal one?

COLERIDGE, J.—The demand here made is for compensation in respect of the land which is taken, and the damage done to that which is left. It is put to me to say, whether this conduct, on the part of the Company, does not amount to a virtual refusal to give compensation. I confess, that from the experience I have had of these applications, I have no doubt, that if this rule was granted, it would be discharged. An application has been made to the Company, to summon a jury, to assess the value of the land taken, and the amount of the injury done by the works of the Company; and to that application, a refusal has been returned. But the Court would never award a mandamus

1841.

Ex parte
PARKES.

where the refusal has been bonâ fide, and the Company were justified at the time in not granting the prayer of the application. It is very easy to say, that it is sometimes hard on claimants not to be able quickly to compel the Company to give compensation. Extreme cases may be hard on one side and on the other; as it would be hard on the Company, that a landholder should be able to compel the Company, whenever there is a cessation of the works, to summon a jury to assess the amount of damages to which the landholder is entitled. But the Court would see, whether the proceedings of the Company were bonâ fide. Now, I find, that on the 17th February, there was a great deal more to do, and the Company were still digging. Under such circumstances, I think the Court would say, that you ought to wait till the Company has done all the damage they are likely to do, and then a jury would assess the compensation for the whole. I don't mean to say that, if a month or six weeks hence it appears that this is done malâ fide, that the rule would not be made absolute; but I think, that if I granted the rule now, on the present state of facts, it would be discharged. It cannot be supposed, that the Company could be proceeding in this way by sinking their works merely to put off the time of making compensation to Mr. Parkes. I think, therefore, that I ought not to grant this rule.

Rule refused (a).

(a) See *Regina v. Wilts and Berks Canal Company*, ante, vol. 8, p. 623.

Ex parte BOUSFIELD.

The Court will, under special circumstances, permit an articulated clerk to be examined before he attains the age of twenty-one.

WHITE applied on the part of an articulated clerk, that he might be examined in Trinity Term, preparatory to his being admitted in the early part of Michaelmas Term next, instead of the end of the Term. He had served the whole period of his five years, but had not attained the age

of twenty-one, nor would he attain that age until the 24th of July, which was after the end of Trinity Term. It was, therefore, necessary, that he should be examined, as prayed, while he was an infant.

1841.
Ex parte
BOUSFIELD.

COLERIDGE, J.—At present no notice has been given, and therefore, if he is allowed to be examined in Trinity Term, the persons who may wish to oppose his examination, or are interested in the matter, will not expect that he should be examined then, and consequently will not be prepared to oppose him. Besides, there is no particular reason assigned for making the application, except that he may be admitted some three weeks sooner, than if he was examined in Michaelmas Term. I think, therefore, that I cannot grant the application.

White, on a subsequent day, renewed the application, and produced an affidavit, in which it was sworn, that the applicant had a promise, from two country attorneys, to be made their London agent, and had similar expectations from two other attorneys. He was, therefore, anxious to be admitted as early as possible in the month of November, so as to be able to take out their certificates on the 15th, and then his name would appear in the annual law lists as their agent.

COLERIDGE, J.—I think, upon the whole, the application may be granted.

Application granted (*a*).

(*a*) In *Ex parte Cragg, ante*, there no special circumstances were stated as the ground of the motion.
vol. 6, p. 256. *Patteson, J.*, refused a similar application, but



COURT OF COMMON PLEAS.

Easter Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1841.

A bill of costs for business done by an attorney on behalf of the assignees of a bankrupt's estate, before a country commissioner, appointed under 1 & 2 Wm. 4, c. 56, is not a taxable bill; and, therefore, an action may be brought to recover the amount of such a bill, without delivering a bill a month before action brought, under the provisions of the 2 Geo. 2, c. 23.

HARPER and Another *v.* WILLIAMS and Another.

THE plaintiffs, who were in partnership as attorneys, declared for work and labour done by them as attorneys for the defendants, on their retainers, in and about prosecuting of divers proceedings in bankruptcy, and for certain fees paid, &c., and for other work and labour in drawing, copying, &c., certain petitions, bonds, &c., and for journeys, &c.; in a second count they claimed 200*l.*, money paid to the defendants' use; and there was a third count on an account stated. The defendants pleaded, first, non assumpsit; secondly, that the plaintiffs, and each of them, were attorneys in the Court of Queen's Bench, and that the money claimed by them was for their work as attorneys, in and about certain proceedings at law, and in equity, to wit, in the Court of bankruptcy, prosecuted, conducted, &c., by them, as attorneys, and for charges and fees in respect thereof; and that the sum in the second count of the declaration mentioned is claimed by the plaintiffs for money paid by the plaintiffs, as such attorneys, in the course of such proceedings, &c.; and that no bill of the fees, charges, and disbursements of the plaintiffs, so being fees,

1841.

HARPER
and Anotherv.
WILLIAMS
and Another.

&c., at law, and in equity, for and in respect of the work, &c., subscribed with the proper hand of the said plaintiffs, was delivered by them to the defendants, the defendants being the persons to be charged therewith, or left for them at their respective last places of abode, one month before the commencement of this suit, according to the statute, &c. Verification. Replication; that the sums claimed by the plaintiffs, in respect of the said work and labour, money paid, &c., were not claimed by them, nor were they due, for the work and labour, or money paid, &c., by them, in and about any proceedings at law, or in equity. Issue.

The cause was tried before *Bosanquet*, J., on the 10th June, 1840, when it appeared, that the amount of the bill sought to be recovered was for business done by the plaintiffs, on behalf of the defendants, as assignees of a bankrupt. The bankrupt was resident at Whitchurch, and a fiat was issued against him on the 19th November, 1838. The business of the bankruptcy was conducted by the plaintiffs on behalf of the defendants, as assignees, before a commissioner in the country. At the trial, two objections were raised; first, that the business done was "at law, or in equity," and that a signed bill had not been delivered by the plaintiffs to the defendants a month before action brought; and secondly, that a sum of 13*l.* 6*s.* was improperly charged to the defendants, that amount being for charges incurred in the sale of an equitable mortgage belonging to the bankrupts, by the plaintiffs; for that that sum should have been deducted from the amount of the mortgage money. It was arranged, that if the defendants succeeded upon the first point, a verdict was to be entered for them; but if they succeeded only on the second point, the amount of the verdict was to be reduced by the sum of 13*l.* 6*s.* A rule having been obtained, in Michaelmas Term, to that effect.

Talfourd, Serjt. (with whom was *Whateley*), now shewed cause. The real question for the decision of the Court

1841.
 HARPER
 and Another
 v.
 WILLIAMS
 and Another.

was, whether the charges, which were the subject of this bill, were charges at law or in equity, within the provisions of the 2 Geo. 2, c. 23, s. 23. In the case of *Crowder v. Davies* (a) it was held, that a bill for business done under a commission of bankruptcy was not taxable under that statute; and that case had been recognized by the decision of the Court in *Hamilton v. Pitt* (b); and it might be taken as conceded by the defendants, that unless the recent statute, 1 & 2 W. 4, c. 56, had made any alteration in the rule, the effect of which would be to render a bill for business done before a country commissioner tenable, they must fail upon the first question raised by this rule. It was material, therefore, to inquire, whether the recent statutes had varied the position of attorneys, or whether the proceedings before a country commissioner had been rendered proceedings at law or in equity. The first section of the statute authorized the erection of a Court of Bankruptcy, which was to be a Court of law and equity, with its various judges and officers; and by section 2, the Court of review was established as a Court of appeal, having superintendence over all matters in bankruptcy, and being invested with those powers which had before been held by the Lord Chancellor. Section 5 related to the question of costs, and it provided, that all costs of suit, between party and party, in the Court of review, should be in the discretion of the Court, and should be taxed by one of the Masters of the Court of Chancery; but by the provisions of the 8th section of the 3 & 4 W. 4, c. 74, the registrar of the Court of Bankruptcy was substituted as the taxing officer for the Master in Chancery, before named; but the provisions of that clause still confined the taxing powers, as being applicable only to costs between party and party, and gave no jurisdiction in a case like the present, when the costs, which were the subject matter of the inquiry, were the costs between attorney and

(a) 3 Younge & J. 433.

(b) 7 Bing. 230; 4 Moo. 868, S. C.

client. The 12th and 13th sections of the 1 & 2 W. 4, c. 56, had an important bearing upon this case, and clearly took the bill for charges out of the statute 2 Geo. 2, c. 23. The 12th clause authorized the Lord Chancellor, in every case in which, by virtue of any former act, he had power to issue a commission of bankrupt to issue his fiat, in lieu of such commission, authorizing the petitioning creditor to prosecute his complaint in the Court of Bankruptcy, or "to prosecute the same elsewhere, before such discreet and proper persons as the Lord Chancellor, &c., by such fiat, may think fit to appoint." The 13th clause provided that every such fiat, so prosecuted in the Court of Bankruptcy, should be filed and entered of record in the said Court, and should thenceforth be a record of the said Court. From these enactments it would appear that the prosecution of the fiat "elsewhere," than in the Court of Bankruptcy, must mean the prosecution of it before the country commissioners, and as the legislature recognised a jurisdiction beyond that Court, it could not be held that that jurisdiction was entirely co-extensive; so, therefore, although the Court of Bankruptcy was constituted a Court of law and equity, by the express provisions of the statute, the Court of a country commissioner would by no means be looked upon in the same light, and not being specially constituted such, was no more such a Court than it was before that statute was passed. But the act 2 & 3 W. 4, c. 114, s. 5, clearly drew a distinction between the two Courts. That clause provided, that all fiats issued in lieu of commissions of bankrupt to be prosecuted elsewhere than in the Court of Bankruptcy, and adjudications by country commissioners, &c., might and should be entered of record in the Court of Bankruptcy, upon the application of any party interested therein, on the payment of certain fees. In the present case, undoubtedly the proceedings could not have been given in evidence until they were enrolled, but the enrolment had not been made until after plea pleaded, and as the defence was set up by the plea, that a signed bill had not been delivered

1841.

HARPER
and Another
v.
WILLIAMS
and Another.

1841.
 HARPER
 and Another
 v.
 WILLIAMS
 and Another.

a month before action brought; the enrolment would not have a retrospective effect in making the bill taxable, as being for business done at law or in equity, when it was not so at the time of the plea. But looking to the powers of the act, and to the provisions which were made for the purpose of the ascertainment of the amounts to be paid to solicitors, it appeared that there was no person whose duty it was to tax bills. [*Erskine, J.*—The Lord Chancellor has not repudiated the general power of taxing bills which he possesses under the 6 Geo. 4, c. 16, s. 14]. Then an argument might well be raised, that there were two distinct jurisdictions in this respect which might well be said to have conflicting authorities. The Lord Chancellor besides, did not exercise that power under all circumstances, and, in point of fact, there was no authority which rendered the delivery of a signed bill in such a case necessary, and the taxing powers suggested to exist, authorized a taxation only when a bill was so delivered. It was admitted, after some discussion, that upon the second point, the rule must be made absolute, and that the costs of the sale of the equitable mortgage were not payable by the assignees out of the bankrupt's estate.

Bompas, Serjt., (*Tomlinson* was with him), in support of the rule. Proceedings in the Bankruptcy Courts are proceedings at law and in equity, within the meaning of the statute 2 Geo. 2, c. 23. The object of that act was to give a general right to parties proceeding in the various Courts to have their costs taxed; and in many instances, although there was no officer specifically named in the statutes regarding the various Courts of Judicature, whether criminal or otherwise, as a taxing officer, the Courts had exercised a discretionary power, in ordering bills of costs to be taxed by some officer appointed nominally for some other purpose (a).

(a) Vide, *Curling v. Sedger*, ante, vol. 6, p. 759, 4 Bing. N. C. 743, 6 Scott, 678, S. C.; *Es parte Wil-* liams, 4 T. R. 496; *Clark v. Donovan*, 5 T. R. 694; *Sylvester v. Webster*, 9 Bing. 388; 2 Scott, 506.

In *Smith v. Wattleworth* (a), it was decided that an attorney of a superior Court, could not recover his bill of costs for proceedings in the Insolvent Court, until he had complied with the requisites of the stat. of 2 Geo. 2, c. 23. In the present case, no real distinction could be drawn between proceedings upon a fiat before a country commissioner, and proceedings before a commissioner in London. The powers, jurisdiction, and mode of proceeding of both were identical; and it would be singular indeed, if the Court would not extend to the parties appearing before both those officers, that privilege, which those whose position enabled them to proceed in the London Courts were clearly entitled to enjoy. The only real distinction between the two cases was, that of the locality of the proceedings; and where the legislature had taken pains to provide for the taxation of bills of costs incurred in the London Courts, surely the same principle would be held to apply to the country Courts also. The proceedings in both Courts were under the same superintendence and control, and were subject to the same rules. [*Tindal*, C. J.—Surely the 12th and 13th sections of this act are explicit enough to show that there is a distinction drawn between the two cases.] The object of the act was to constitute the proceedings to be at law or in equity, and not to give a character to the Court; and if it were so, the proceeding must be held to come within the stat. of Geo. 2, whether they were taken before a country or a London commissioner. He cited *Burton v. Chatterton* (b). It was clear that in the Court of Bankruptcy there was a taxing officer, and if he possessed any jurisdiction at all, it extended as well to a country case, as to one which arose in London.

TINDAL, C. J.—The question is, whether the items which form the subject matter of this bill were fees, charges,

1841.
 HARPER
 and Another
 v.
 WILLIAMS
 and Another.

(a) 4 B. & C. 364; 6 Dowl. & Ry. 510. (b) 3 B. & Ald. 486.

1841.
HARPER
and Another
v.
WILLIAMS
and Another.

or disbursements at law or in equity, within the meaning of the stat. 2 Geo. 2 c. 23, s. 23, because, unless they are brought, either by the necessary meaning of the words of that statute, or by the authority of decided cases within that description, the bill is not taxable; and, therefore, as it has been decided by various cases, the objection that it was not delivered one month before action brought, cannot be successfully raised. It is admitted, that before the late statute, (1 & 2 W. 4, c. 56), which created the Court of Bankruptcy, the costs of proceedings before the Commissioners of Bankrupts, unless these were charges for proceedings in the Court of Chancery, such as proceedings for the allowance of the certificate included in the same bill, were not the subject matter of taxation. There are cases which go to that extent, to which it is not necessary to refer. The only question is, whether, under the 1 & 2 W. 4, c. 56, proceedings under a country fiat are properly to be called proceedings at law or in equity? It appears to me that the distinction drawn, in the 12th and 13th sections of the act, is so pointed and clear, that we cannot hold proceedings under a country fiat to come within that description. The 12th section provides, "That in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the great seal, it shall and may be lawful for him, and also for the Master of the Rolls, the Vice Chancellor, and each of the Masters of the Court of Chancery, acting under any appointment by the Lord Chancellor, to be given for that purpose, on petition made to the Lord Chancellor, against any trader having committed any act of bankruptcy, by any creditor of such trader, and upon his filing such affidavit, and giving such bond as is by law required, to issue his fiat, under his hand, in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, or to prosecute the same *elsewhere*, before such discreet and proper persons as the Lord Chancellor, &c.,

may think fit to nominate and appoint; and that the persons so appointed shall have the like power and authority to all intents and purposes, as if they were assigned and appointed special commissioners, by virtue of a commission under the Great Seal." Certainly, therefore, there is a distinction taken between a fiat issued at once, authorizing proceedings to be taken in the Court of Bankruptcy, and a fiat which authorizes them to be prosecuted "elsewhere." Sec. 13 goes on to define what that distinction is. It enacts, "That every such fiat, prosecuted in the said Court of Bankruptcy, shall be filed and entered of record in the said Court, and shall thenceforth be a record of the said Court; and it shall thereupon be lawful for any one or more of the commissioners thereof, to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupts, save and except as such proceeding may be altered by virtue of this act." Therefore, there is no doubt at all, that proceedings upon a fiat issued at once, to be prosecuted in the Court of Bankruptcy are proceedings in a Court of law and equity, that Court being so constituted by section 1 of the act; but then there being a subsequent section, which only authorizes the enrolment of the country fiat, that still further points out the distinction between proceedings authorized by the town fiat and by the other. I cannot bring my mind to assent to the proposition, that proceedings upon a fiat before a country commissioner are proceedings at law or in equity, and this objection, therefore, cannot be allowed. As to the reduction of damages by the sum of 13*l.*, I think it is made out that this 13*l.* should properly have been deducted out of the mortgage money, and that, therefore, it cannot be recovered from the assignees.

BOSANQUET, J.—It is clear that before the recent statute, proceedings in bankruptcy were not considered as proceedings at law or in equity within the 2 Geo. 2, c. 23, so as to

1841.
 HARPER
 and Another
 v.
 WILLIAMS
 and Another.

1841.

HARPER
and Anotherv.
WILLIAMS
and Another.

require a bill of costs relating to such proceeding to be delivered a month before action brought, and the question now is, whether the stat. 1 & 2 Wm. 4, c. 56, has made any difference in that respect? Undoubtedly it has directed, in the very first section, that the Court of Bankruptcy shall be a Court of law and equity. Does it, therefore, follow, that proceedings which are proceedings in bankruptcy, carried on before a commissioner in the country, and not before the Court of Bankruptcy, are, therefore, to be considered as proceedings at law or in equity? I think that the provisions of sections 12 & 13 are decisive. There are two distinct proceedings; those in the Court of Bankruptcy, and those not in the Court of Bankruptcy, but in other places appointed by the Lord Chancellor or other persons, which appear to me to be analogous to proceedings in bankruptcy before the statute passed, and if they were not proceedings at law or in equity before this statute passed, they are not made so by the statute. The 14th section provides for the manner in which the country commissioners are to be appointed. We know that formerly the commissioners were named by the Great Seal, and certain persons were named for the purpose of transacting business, whether in London or not, and it is now provided, that the judges of the circuit shall return to the Lord Chancellor the names of persons fit to go the circuit as commissioners, from whom the commissioners shall be selected. The proceedings before these commissioners are not proceedings in the Court of Bankruptcy, and I cannot say that there is anything in this act which has made a change in the character of any of the proceedings, except those which are carried on in the Court of Bankruptcy. Whether proceedings in that Court are proceedings at law or in equity is another question.

COLTMAN, J.—It appears to me that the Court of Bankruptcy is made, by the first section of this act, a Court of law and equity, and, therefore, the argument would be very

strong if a question arose as to a London commission, but I find nothing in the act which warrants the conclusion, that proceedings before a country commissioner, are proceedings at law or in equity. The argument on the second section, that the Court of Review has authority to superintend the proceedings on all commissions, shews nothing, because the Lord Chancellor had the same power before the passing of this act, and such proceedings were held to be not within the act of George the Second. But then it is said, that these proceedings have been subsequently recorded in the Court of Bankruptcy, and have thereby become proceedings in a Court of law. To that, it seems to me, that it is enough to say, that the meaning of the words of 2 Geo. 2, c. 23, is, that the proceedings must be for fees, charges, and disbursements at law or in equity at the time when the charge is made, and though the proceedings should be subsequently made proceedings at law or in equity, it will not entitle the party to have a bill of costs taxed, which was incurred previously to the proceedings being made proceedings at law or in equity. Upon the other point, I entirely agree with my Lord.

ERSKINE, J.—I am of the same opinion. The fees, charges, and disbursements mentioned in the 2 Geo. 2, c. 23, have been always interpreted as being necessarily fees in a Court of law or equity, in order to subject the attorney to the necessity of delivering his bill a month before action brought. The question, therefore, is reduced to this, whether these fees are, or are any of them fees in any Court of law or equity? No one item has been pointed out as being for any fee or disbursement otherwise than as before a country commissioner. Therefore, the only question is, whether country commissioners of bankrupt are sitting in Court, and whether proceedings by them can be said to be proceedings at law or in equity? Before the passing of the 1 & 2 Wm. 4, c. 56, it was never supposed that com-

1841.

HARPER
and Another
v.
WILLIAMS
and Another.

1881.
HARPER
and Another
v.
WILLIAMS
and Another,

missioners, whether in town or country, were sitting in Court so as to bring charges for business done within the 2 Geo. 2, c. 23, and decisions have been pronounced where the contrary was held; and in order to bring the bill of a solicitor within the act, it was necessary to shew that some act had been done before the Lord Chancellor, which constituted a charge at law or in equity. Then has this statute made any difference? It has with respect to town commissioners, because it has created a Court of Bankruptcy, of which the commissioners form a part. But as to the country commissioners, it has created no other difference than that instead of the Lord Chancellor having the general selection of the commissioners, he is limited in his choice to the list given to him by the judges of the circuit. The country commissioners are not part of the London Court, and the legislature does draw the distinction between the proceedings prosecuted before the town commissioners and the proceedings before the country commissioners, which has been stated by my Lord Chief Justice. Therefore, there is nothing in this act which appears to me to raise any distinction between the position of the solicitor in this case and that which he occupied before this act, and I think that the non-delivery of the bill of costs is no bar to the plaintiff's recovering. He is not entitled to recover the 13*l.* 6*s.*, however, because the law in this case is clear, that the money is payable out of the mortgage money, and not by the assignees, out the estate.

Rule absolute, to reduce the damages by 13*l.* 6*s.*

1841.

COTTAM and Another v. PARTRIDGE.

W. H. WATSON moved for a rule, calling upon the plaintiffs in this action to shew cause why, in default of their settling a special case, ordered to be submitted for the decision of this Court, the verdict, which had been entered for the plaintiffs on the trial, should not be set aside, and a verdict entered for the defendant; or why a new trial should not be had. It appeared that the cause was tried at the sittings after Trinity Term, 1839, when a verdict was entered for the plaintiffs, subject to a special case, to be submitted to the Court for its consideration. Some differences took place between the parties as to the terms in which the case was to be stated, and it had remained unsettled up to the present time. The defendant became bankrupt in the month of April, 1840. It was urged, that the plaintiffs were bound, notwithstanding the bankruptcy of the defendant, to proceed with the cause, for that the attorney of the defendant had an interest in the suit, which might be materially affected by its final determination.

At the trial of a cause, a verdict was ordered to be entered for the plaintiffs, subject to the decision of the Court, upon a special case to be stated between the parties. The defendant subsequently became bankrupt, the Court refused, upon application, to set aside the verdict, and enter a verdict for the defendant, but directed that a new trial might be had between the parties.

Hayes, on a subsequent day shewed cause. He was prepared to admit the authority of the Court to set aside the verdict entered for the plaintiffs, and to grant a new trial, but he contended that it had not the power to enter a verdict for the defendant. He cited *Lord Henley's Bankruptcy*, pp. 136 and 413, and *Tidd's Practice*, 899: the cases of *Medley v. Smith* (a), and *Woolley v. Kelly* (b), were also in point. The plaintiffs were willing to consent to a stet processus, and he contended that the case was in a great degree analogous to that of judgment as in case of a nonsuit.

W. H. Watson, in support of the rule, urged, that the

(a) 6 Moo. 53.

(b) 1 B. & C. 68.

1841.
 COTTAM
 and Another
 v.
 PARTRIDGE.

authority of the Court to enter a verdict for the defendant was undoubted; *Jackson v. Hall* (a). The verdict was entered for the plaintiff as a matter of form, and if the plaintiffs refused to perform the condition upon which that verdict was to stand, the Court would set it aside, and resort to the only alternative; namely, a verdict for the defendant. He also cited *Taylor v. Gregory* (b), and *Wilkinson v. Time* (c).

TINDAL, C. J.—The cases which have been cited, some of which are rather strong in support of the view contended for on the part of the defendant, are cases in which there has been a very unnecessary refusal to go on by the parties. In this case there is no breach of faith—no wanton receding from the agreement entered into, but a new state of facts has arisen; namely, the insolvency of the defendant. Under these circumstances, we ought not to force the plaintiffs to go on to incur additional expense; but at the same time we have no right to prevent the defendant from having his legal remedy; and all we can do is to say, that there may be a new trial. Probably the parties may come to a good understanding, and consent to a *stet processus*.

COLTMAN, J.—I am of the same opinion. I regret that Mr. *Watson* has been able to produce no case in support of the proposition on which his rule proceeds, because I think that it is a pity that the costs which have been incurred should be thrown away; but I think all the Court can do is to grant a new trial.

ERSKINE, J.—I am also of opinion that we have no authority to enter a verdict for the defendant, but at the same time, I think that we ought not to prevent him from having a new trial.

Rule absolute accordingly.

(a) 2 Moo. 478.

(b) 2 B. & Ad. 774.

(c) *Ante*, vol. 4, p. 37.

1841.

BIGNALL v. GALE.

ATCHERLEY, Serjt., *Channell*, Serjt., and *Humfrey*, shewed cause against a rule which had been obtained on behalf of the defendant, for setting aside the award of the arbitrators made in this suit, upon the grounds; first, that the arbitrators had been guilty of improper conduct, in hearing evidence in the absence of, and without notice to, the defendant or his attorney; secondly, that the arbitrators had been guilty of improper conduct in allowing the attendance of the plaintiff's attorney, at certain meetings held by them upon the matters of the reference, in the absence of, and without notice to the defendant or his attorney; thirdly, that one of the arbitrators had been guilty of improper conduct in requiring payment of a certain sum of money, under circumstances stated in the affidavits; and lastly, that the arbitrators had been guilty of improper conduct in conferring with the plaintiff's attorney upon the matters of reference, at meetings held in the absence of, and without notice to, the defendant or his attorney.

From the affidavits of the defendant and one Mr. Skelton, on which the rule had been obtained, it appeared that an action was brought by the plaintiff against the defendant, to recover the sum of 524*l.* 8*s.* 8*d.*, the amount of two bills of exchange, and also the sum of 5,999*l.* 18*s.* 5*d.*, alleged to be due upon a general account; and that the cause having come on for trial on the 9th February, 1839, an order of Court was made, with the consent of all parties, referring the cause and all matters in difference to the arbitration and award of two lay arbitrators, named John Cochran and James Howell. Various meetings were held, at which witnesses were examined and accounts produced, and amongst

The defendant moved to set aside an award which had been made by two arbitrators against him, upon the grounds that the arbitrators had improperly received evidence in the absence of the defendant, and had also been guilty of improper conduct, in holding meetings, and conferring with the plaintiff's attorney, with respect to the matters in difference, in his absence. It appeared, that the defendant was aware of the existence of these grounds of objection, many days before the award was made, but that he made no objection before the arbitrators, and also that he had had notice of the meetings, at which the evidence was received, and had been summoned to produce books at them, but that he had omitted to attend:

Held, that although it would

have been more regular for the arbitrators to send notice of the result of the examinations to the defendant, yet that the Court would not, under the circumstances, set aside the award for such irregularities as were disclosed.

1841.

BIGNALL

v.
GALE.

those persons who were called on behalf of the plaintiff was one named Christopher Woollacott, who had formerly acted as accountant for the defendant. The case for the plaintiff being completed, the defendant, by his counsel, opened his defence; and on the 31st August, 1840, the cases of both parties to the reference were declared by the arbitrators, and by the parties on both sides, to be finished and closed. On the 17th December, the defendant and Skelton had an interview with John Cochran, the arbitrator, and were informed by him, that since the final closing of the cases as above stated, the arbitrators had re-examined Christopher Woollacott on behalf of the plaintiff, in the presence of Mr. Shuter, the attorney for the plaintiff, but in the absence of the defendant, his attorney or counsel; that Mr. Howell had also personally and alone applied to Messrs. Herries, the bankers, for and had obtained evidence as to certain payments alleged to have been made by the defendant to the plaintiff; and also to Messrs. Cocks and Co., of Charing-cross, but that their evidence had not then been obtained. The defendant thereupon remonstrated with Mr. Cochran on the injustice towards him, of the arbitrators examining witnesses and obtaining evidence in his absence, and in the absence of his professional advisers, whereupon Mr. Cochran answered, that he and Mr. Howell had determined to examine witnesses privately, with or without the permission of the defendant, and should decide upon such evidence, whether it pleased him or not. The affidavits then went on to set forth the facts, upon which the third ground of complaint was founded, and as that was deemed to be sufficiently answered in the affidavits now produced on shewing cause, it is unnecessary to detail them. The deponents then stated, that on the 18th December they again saw Mr. Cochran, who informed them that he had applied to a Mr. Jarvis, of Long-acre, for evidence as to a check alleged to have been lent by the plaintiff to the defendant, and which the plaintiff's attorney had produced as a set-off to one of the bills of exchange, put in by

the defendant as a part of his defence, and since the closing of the case, and that he had found that the check could not be successfully brought against the defendant; and Mr. Cochran then said, that the evidence which had been originally taken before them went for nothing, and that the evidence which they were then procuring should decide the case. The deponents then went on to state, that they had been informed and believed that Mr. Shuter, the attorney for the plaintiff, had been present at several of the private meetings of the arbitrators, held for the purpose of going through, discussing, and determining upon the evidence put in by the plaintiff and the defendant, and gave his opinion as to the sum to be awarded, and that he also took minutes of the evidence of Christopher Woollacott, but of which the defendant had been unable to obtain a copy; and the defendant further swore, that he believed that Mr. Shuter had obtained from the arbitrators, or one of them, information of the times when they intended to meet to consider their award, after the case had been so closed on the 31st of August, and that he was permitted to attend and take an active part at several of such meetings, but that no such information was ever given to, or applied for by this deponent, or to the best of his knowledge and belief, to or by any person on his behalf: and that neither deponent, nor any person on his behalf, ever attended at any meeting, or took any part with the said arbitrators in the matter of the said reference, or of their award subsequent to the final closing of the plaintiff's and defendant's cases on the 31st of August, 1840. There was also an affidavit of Mr. S. Williams, the defendant's attorney, who deposed, that having obtained information of the reception of evidence by the arbitrators as above described, he had applied to Mr. J. Howell, one of the arbitrators, for a copy of the minutes of Mr. Woollacott's examination, with which he had promised to furnish him, but which the deponent had never received. The award, it appeared, was made on the 8th of January,

1841.

BIGNALL
v.
GALK.

1841.

BIGNALL
v.
GALE.

1841, and directed the defendant to pay to the plaintiff, the sum of 2,736*l*., together with the costs of the cause, and of the reference. The present rule was obtained on the 14th of January. Affidavits in answer, sworn by Messrs. Cochran and Howell, by Charles Bignall, the brother of the plaintiff, by Mr. Woollacott, Mr. Shuter, and by Mr. Hook, clerk to Messrs. Herries and Co., were now produced. From these, it appeared, that after the closing of the respective cases of the plaintiff and defendant on the 31st of August, 1840, the arbitrators determined on the 11th of September, at a meeting which they held, and at which no person was present besides themselves, that they would call for and insist upon the production of all books of account, bankers' books, check books, and other books, matters, and things relating to all transactions and dealings between the plaintiff and defendant; that written notices were sent by them to the attorneys of the plaintiff and defendant for the production of the same, at the next meeting of the arbitrators, which was fixed for the 25th of September, and that on that day the arbitrators having met, it was found that the plaintiff's attorney only was in attendance. A new meeting was directed to take place at the same house at which they were then assembled, (Fendall's Coffee House), on the Friday, 2nd of October, and a notice was sent to the defendant, peremptorily requiring his attendance, and the production of the books, the particulars of which had been specified in the former notice; and informing him, that in the event of his non-appearance, the arbitrators would proceed in his absence, but the defendant still absenting himself from their meeting on that day, a further adjournment to the 15th of October was determined on, and a renewed notice for that day was given to the defendant, with an intimation, that unless he attended then, that the arbitrators would proceed in his absence. On the 15th of October, the arbitrators and the plaintiff's attorney were once more in attendance, and then certain books were produced to them, as coming from the

1841.

BIGNALL

v.
GALE.

defendant, which it appeared had been left by mistake at the King's Arms, Palace Yard, instead of at the Exchequer Coffee House, but the defendant was still absent, and no one appeared on his behalf. The plaintiff's attorney then delivered up all the books and papers belonging to the plaintiff, which were in his power or custody, and the arbitrators, thereupon, proceeded with the reference; they found great difficulty, however, in the examination of several of the bills of exchange, put in by the defendant, relating to the accounts in dispute between the plaintiff and defendant, by reason of the defendant having withheld several important books, amongst which were the balance books, check books, and bill books, and the arbitrators were, therefore, desirous, and mutually agreed that Mr. Woollacott should be recalled, to identify the books which had been produced by the defendant, and to specify what, if any books he knew the defendant had possessed which were not produced, and, therefore, they requested the plaintiff's attorney to procure his attendance. On the 4th of December, Mr. Woollacott appeared, and the arbitrators put some questions to him, with respect to the books, and requested Mr. Shuter to take down in writing the statement which he made, while they looked over the books which were identified, and Mr. Woollacott having spoken to the identity of some of the books, declared that there were two bill books, besides check books and balance books which were not produced, and which would have afforded important information. Immediately after the examination of this witness, he quitted the room with Mr. Shuter, no comment having been made by the arbitrators, upon what had occurred. The affidavits then went on to state that some doubt existing as to the real dates of some bills of exchange, which had been produced by the defendant, by reason of a portion of their contents being cut off or obliterated, it was mutually agreed between the arbitrators that they should make inquiries of Messrs. Cocks and Co., and Messrs. Herries and Co., with respect to these bills, and also that they should make in-

1841.

BIGNALL
v.
GALE.

quiries of Mr. Jarvis, with regard to the check named in the affidavit in support of the rule, in order that they might obtain a knowledge of facts, which might guide them in their decision. The affidavit further stated, that the plaintiff's attorney had not, at any time interfered with the proceedings of the arbitrators, except so far as has been stated, that he never attended any private meeting of the arbitrators, for the purpose of discussing or determining the evidence put in, and that no person was aware of the amount for which the award was made, before the same was published, except the solicitors by whom the same was prepared. It was now contended, that the whole of the allegations contained in the affidavits which had been produced in support of the rule, were fully answered, and that the Court would not re-open the whole matters which had already been decided upon. The defendant had been made aware of what was going on, before the award was made, but he offered no objection then to the proceedings, but as soon as he found that the award was against him, he sought to set it aside. He had had abundance of notice to appear at those proceedings of which he complained, and it might have been a reasonable belief on the part of the arbitrators, that he had abandoned his defence altogether. The cases of *Atkinson v. Abraham* (a), and *Hewlett v. Laycock* (b), were cited.

Shee, Serjt., in support of the rule, contended that the arbitrators had been guilty of such gross irregularities in proceeding in the absence of the defendant, that the Court would not permit the award to be sustained. The re-examination of a witness had irregularly taken place with the knowledge and the consent of the plaintiff's attorney, and the Court would not allow the arbitrators to decide what effect the evidence thus obtained had had upon their minds, *Fetherstone v. Cooper* (c). It was the duty of the arbitrators to send whatever new evidence they had obtained, to the defendant.

(a) 1 Bos. & P. 175.

(b) 2 Carr. & P. 574.

(c) 9 Ves. 67.

He also cited *Phipps v. Ingram* (a), *Watson on Awards*, p. 236, *Re Hick and Others* (b), and *Walker v. Frobisher* (c).

1841.

BIGNALL

v.
GALE.

TINDAL, C. J.—In coming to a determination upon this case, I cannot lose sight of that which makes a great impression on my mind, that the defendant, for three weeks before the award was made, knew of all the objections which are now raised, and never made them the ground of complaint to the arbitrators themselves. He was informed on the 17th of December, that a witness had been examined, and he was told by Mr. Cochran, not only that Christopher Woollacott had been recalled, but that the arbitrators had also been to other persons, and had obtained information from them. Now what right had the defendant to lie by with these grievances dormant in his bosom, with a determination that if the award was against him, he should come forward and raise these objections? I think that if he intended to make the objections, he should have raised them at once, and should not have deferred making them until after the award had been published. But I think that there is another ground also on which the objections of the defendant are answered. That is, that in the course of the investigation, after the examination of witnesses had been opened afresh, for the case was closed on the 31st of August, three notices were given to the defendant for three different days to appear and produce certain books and papers. On the 11th of September, a meeting was fixed to take place, at which it was agreed that certain books should be brought together, and notice was given both to the plaintiff and the defendant to be there. The plaintiff attended, but the defendant neither by himself nor his attorney appeared, and there was in consequence, an adjournment to the 25th. Notice was again given both to the plaintiff and defendant for that day, but the defendant did not appear. There was a new adjourn-

(a) *Ante*, vol. 3, p. 669.

(c) 6 Ves. Jun. 70.

(b) 8 Taunt. 694.

1841.

BIGNALL

v.
GALE.

ment to the 2nd of October, fresh notices being given, but the defendant again made default, and then there was a final notice, that unless the books were produced by the 15th of October, none would be received. What more could the arbitrators do? I think that they may well have supposed that the defendant meant to leave the case as it stood, and that they were right in thus proceeding with their inquiry. But after all, if it had appeared that any serious injury was sustained by the defendant by what took place in the course of this examination, although he would even then have appeared with a very bad face to raise the objection, the case might have been opened, but it appears that all the witnesses who were examined did, was to place the defendant's books before the arbitrators, so that they might consider their contents. This case then comes within the case of *Atkinson v. Abrahams*, where it was agreed, that after the examination of the witnesses was concluded, the arbitrators should be at liberty to recal them, and examine them for themselves; and when we take into consideration the knowledge of the defendant of what had been done, and the circumstance of his refusal to attend the arbitrators when he was summoned, I think it would be improper to re-open the case.

BOSANQUET, J.—I am of the same opinion. If any irregularity was committed by the arbitrators in this case, it was an irregularity of which the defendant had full notice long before the award was made, and not only had he full notice of the irregularity, but full notice also of the intention of the arbitrators to proceed upon the information which they had obtained by means of it. The arbitration, as far as parol evidence was intended to be taken, closed on the 31st of August, but it was competent for the arbitrators to require further evidence, either documentary or parol, if they thought fit. They came to the resolution, in the month of September, that all books should be called for. Three notices are given to both the plaintiff and de-

fendant to attend. The defendant has notice in writing, but he does not think fit to attend. An adjournment is, in consequence, necessary, and a second notice is given; but to this he is equally inattentive; and again, upon a third notice being given, he still absents himself from the meeting. What were the arbitrators to suppose, but that he stood upon what had been set up on his behalf before, and that perceiving that the case was going against him, it was useless for him to strive any further? The arbitrators had desired that all books should be called for, and notice had been given to both parties to bring them. The plaintiff brought his books, and the defendant sent a certain number; and then it appears, that the arbitrators having already examined a person named Christopher Woollacott on the part of the plaintiff, who had been employed by the defendant as an accountant, they sent for him, and desired to know whether the books produced by the defendant were those which came in question in the investigation. He said that he did not think that all the books were produced, but that those which had been sent, were some of those which were referred to. All this was communicated to the defendant on the 17th of December, but he never sent to know what Woollacott had said, or to offer any objection to the further proceedings of the arbitrators. He was told also, that there had been some inquiry at certain bankers as to certain bills which had been sent in, but he lay by until the award was made, and a few days after it was made, he moved for this rule. Whatever irregularity there may have been in the conduct of the arbitrators in examining Woollacott, and in endeavouring to discover whether there really was any meaning in these bills, I think, that after the continued refusal of the defendant to attend the arbitrators, and his neglect to take objections to the proceedings, after he had been made acquainted with them, before the award was made, the award cannot now be objected to, and this rule must be discharged.

1841.

BIGNALL
v.
GALE.

1841.

BIGNALL

v.
GALE.

COLTMAN, J.—I am of opinion, that under the circumstances of this case, there is not sufficient ground for disturbing the award. The circumstance weighing upon my mind, is that of the repeated notices given to the defendant to attend the arbitrators, the last of which was accompanied by a peremptory intimation, that unless the defendant attended, the case would proceed in his absence. I do not see what conclusion the arbitrators could come to, when he neglected to obey those repeated summonses, but that he had abandoned the business. He might have supposed that the production of documents would have led to some further discussion, but he omitted to attend, and he appears to have entirely abandoned his defence, beyond that which he had already raised. Under these circumstances the arbitrators went on, and though, perhaps, they would have done better if they had given notice to the defendant of what took place, yet I cannot say, that after the original default of the defendant, they were bound to do so. The defendant was aware of all the circumstances, however, before the award was made, but he did not apply for a further day to bring forward any new facts, but he was content to lie by and take his chance of the award, and then, when he found that it was against him, he came forward to complain of this grievance. If, therefore, any injury was produced to the defendant, it was his own fault, and the award cannot now be set aside.

ERSKINE, J.—I cannot say, upon looking at the whole of the facts of this case, that the arbitrators have proceeded with perfect regularity, because, although they gave notice to the defendant, that unless he attended their meeting they would proceed *ex parte*, that seems rather to import that they would proceed *ex parte* to the consideration of these documents, than to the further examination of witnesses; and if it had appeared that the defendant had incurred any injury in consequence of that inquiry subsequently made, I should

have thought, notwithstanding the notices given, that this Court would have interfered to set the matter right. But, taking the whole of the case, as it appears upon the affidavits, it should seem that the defendant produced documents, some of them mutilated, and some not dated, upon which it was impossible for the arbitrators to come to any conclusion without further inquiry; and as the defendant had been summoned to produce all these documents to fix dates, the arbitrators thought it right to make inquiries of Messrs. Cox & Co., and of other persons, as to dates, which they could not otherwise ascertain. The defendant has not shewn that the result of this inquiry produced any injury to him, and as he has lain by, with a view to set aside the award, after it was made, although he had notice of the examination of the witnesses before the award was made, and in time for him to object to the examination or re-examination of those persons, the award cannot be set aside. Therefore, although there might have been something which would amount to irregularity on the part of the arbitrators, the defendant has waived it by his own conduct, and cannot succeed in the present attempt to take advantage of it.

1841.
BIGNALL
v.
GALE.

Rule discharged.

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NEWTON v. HARLAND and Another.

A rule had been obtained by the plaintiff in person in this suit, calling upon his attorney to shew cause why he should not pay to him the costs of the taxation of his bill of costs, as between attorney and client, and why, upon certain terms which were set out, proceedings should not be stayed, in an action now pending in the Court of Exchequer, and why

Where upon the taxation of an attorney's bill of costs, between attorney and client, it appeared that charges were made in respect of business

done, and disbursements made, during a period in which the attorney, although an attorney of the Q. B., was not qualified to practise in the C. P., (the charges having arisen before the statute 7 Wm. 4, and 1 Vict. c. 56,) and those charges were struck off; the Court held, that the Master, in making that reduction was right, and that the total amount of the bill being thus reduced by more than one-sixth by such taxation, the attorney was liable to pay the costs of taxation.

1841.
 {
 NEWTON
 v.
 HARRISLAND
 and Another.

the attorney should not pay the costs of this application. It appeared, from the affidavits, that the attorney had been retained by the plaintiff to conduct the proceedings in an action of trespass, brought by him against the defendants. The cause had proceeded to issue, when it was discovered by the defendants that the attorney, although an attorney of the Court of Queen's Bench, was not qualified to act as an attorney of this Court during a considerable portion of the time for which he had been so engaged. On the 15th July, 1837, the statute (7 Wm. 4, and 1 Vict. c. 56, s. 4,) came into operation, entitling an attorney of one Court to practise in other Courts. The bill of costs delivered by the attorney to the plaintiff, included charges for business done, and disbursements, &c., made both before and since the 13th July, 1837 (a). So much of the bill as referred to the period preceding that date was struck off by the Master, and by this reduction the total amount of the bill was reduced by more than one-sixth. The present motion had in consequence been made, under the provisions of the 2 Geo. 2, c. 23, s. 23.

Andrews, Serjt., now shewed cause, and contended that the case came within the principle of the decision in *White v. Milner* (b). Upon the second point raised by the rule, he urged, that the Court could have no jurisdiction over the cause in the Exchequer; and that as the rule asked too much, and the terms proposed were different from those which had been before offered by the plaintiff, as it appeared from the affidavits, the Court would not, even if the rule were made absolute, give the plaintiff the costs of the application.

Mr. *Newton*, the plaintiff in person, in support of the rule, contended that the charges, which had been struck out, were inserted in the bill with a perfect knowledge, on the part of

(a) Vide *Newton v. Spencer*, ante, 5 Scott, 489, S. C. vol. 6, p. 401; 4 Bing. N. C. 174; (b) 3 H. Bl. 357.

the attorney, that he had no right to them, and the Court would hold him responsible for his improper endeavour to obtain them, by compelling him to pay the costs of taxation, and of this rule.

1841.
 {
 NEWTON
 v.
 HARLAND
 and Another.

Cur. adv. vult.

TINDAL, C. J.—This is a case in which Mr. Newton, the plaintiff, has carried his attorney's bill before the officers of the Court, to be taxed as between attorney and client; and upon the taxation it appeared, that during a considerable time for which the attorney was retained by Mr. Newton, and during which he performed services for him, he had not been entered as an attorney of this Court: he was an attorney of the Court of King's Bench, but not of this Court; and these transactions happened before the time when an attorney of one Court was enabled to practise in another Court. The objection of Mr. Newton is, that all those items of charges down to the 13th July, 1837, and all fees, and in some instances disbursements of the attorney in the progress of the cause being made, and the work and labour done by him as an attorney of this Court, when his name was not on the rolls of the Court, they could not, by law, be charges which he was entitled to recover, and that more than one-sixth having been taxed off the whole bill, the attorney is liable to the costs of taxation. We think that the Master was right in the view which he has taken, namely, that by law these charges were not allowable, and that, therefore, they should be struck out of the bill. Then the second ground upon which this application rests is, that in consequence of this striking off the charges of the attorney, the whole of the amount of the bill has been reduced by more than one-sixth. The statute, 2 Geo. 2, c. 23, s. 23, provides, that where an attorney's bill is reduced by more than one-sixth on taxation, the costs of taxation shall fall upon the attorney. It was upon this ground that we wished to consider the case, as we wished to have the statement of the Master, whether this case could be considered as falling

1841.
NEWTON
v.
HARLAND
and Another.

within the principle of any of those cases which decided, that although the taxation reduced the bill by more than one-sixth, yet where such reduction has not been by the actual taxation of each item, but by leaving out of the bill a whole class of charges, which were introduced either by misapprehension or mistake, the bill is not within the strict terms of the statute. Then, would this case fall within those cases? The first case is that of *White v. Milner* (a), where an attorney, in making out his bill against his client, put in various items which were not properly chargeable, and the Court held, that as the costs taxed off consisted of one whole class which the attorney had no reason to charge against his client, but which were chargeable against some one else, the mere striking out of those charges was not, in effect, a reduction of the bill by the taxation of particular items, but that the case stood as if the original bill had been in the same form as it was after the striking out of these items. The case of *Morris v. Parkinson* (b) shews that this principle ought not to be extended. There an action was brought in the wrong form, and was discontinued on that ground, and then a new suit was commenced. The bill of costs went before the Master for taxation, and by taking off those charges, made in respect of the original action, the amount of the bill was reduced by more than one-sixth; and the Court then held, and I think properly, that these were items which did not properly fall within the reach of the case of *White v. Milner*, and that the charges being made entirely through the fault of the attorney, he was liable to the consequences of his own improper conduct, and must pay the costs of taxation, as in the case of any other overcharge. We think that this case falls within the principle of that decision. It is with some regret that we throw upon the attorney the costs of taxation, and we trust that they are not large in amount, but as the items are struck out, on the ground that they are not allowable by law, I am afraid

(a) 2 H. Bl. 357.

(b) 2 C., M. & R. 178; *ante*, vol. 3, p. 744, S. C.

to extend the principle of the case of *Morris v. Parkinson*, by saying that they constitute a class of charges within the case of *White v. Milner*; I, therefore, think, and my brethren agree with me, that the rule for allowing the plaintiff the costs of taxation should be made absolute. With regard to the costs of this application, a greater discretion is given to the Court, and as on this occasion, it was not simply a rule to give the plaintiff the costs of taxation, but also a rule which embodies in it, the settlement of another action between the attorney and Mr. Newton, and as the offers made by Mr. Newton, before the rule was obtained, are not in the same terms as those made in this rule, we are of opinion that the costs of this application should not be included in the rule.

Rule absolute, without costs.

DAVIS v. CHAPMAN.

THE declaration stated, that the plaintiff heretofore, to wit, on the 18th of August, 1836, in the Court of King's Bench, by the consideration and judgment of the said Court, recovered against John Noel 360*l.*, which were adjudged to the said plaintiff in and by the said Court, &c. for his the said plaintiff's damages, by him sustained, as well on occasion of the not performing by the said J. Noel of certain promises before then made by him to the said plaintiff, as for his, the said plaintiff's costs and charges by him, about his suit in that behalf expended, whereof, &c. And the said plaintiff avers, that therefore afterwards, to wit, on the 2nd day of November, in Michaelmas Term, 1836, the said J. Noel being then personally present in the said Court, &c., was then and there, in and by the said Court,

did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and before and at the commencement of this suit, kept and detained, "and still doth keep and detain the said prisoner in his custody as such Marshal, in execution, at the suit of the plaintiff:" *Held*, that under the terms of the plea, evidence of an escape since the commencement of the suit, was inadmissible

1841.
 }
 NEWTON
 v.
 HARLAND
 and Another.

To an action against the Marshal for an escape, the defendant pleaded, that after the alleged escape of the prisoner, he, before the commencement of the suit, and before the defendant had notice of such escape, voluntarily and of his own accord returned again into the custody of the defendant, and that he, the said defendant,

1841.

DAVIS
v.
CHAPMAN.

&c., at the prayer of the said plaintiff, committed to the custody of the defendant, then being the Marshal of the Marshalsea, &c., charged in execution for the said sum of 360*l.* the damages aforesaid, there to remain until the said J. Noel should satisfy the said plaintiff the sum of 185*l.* 15*s.* parcel of the said damages, &c. By virtue of which said commitment, the said defendant so being such Marshal, &c., kept and detained the said J. Noel, &c., until he, the said defendant, &c., not regarding the duty of his said office, &c., afterwards and before the commencement of this action, to wit, on the 16th of April 1838, freely and voluntarily suffered and permitted the said J. Noel to escape and go at large out of the said prison, and out of the custody of the said defendant, wheresoever the said J. Noel would, without restraint, and without the license and against the will of the said plaintiff, then and still being wholly unpaid and unsatisfied, the said sum of 185*l.* 15*s.*, &c., and the judgment then and still being in force and effect wholly unpaid and unsatisfied. By reason whereof, &c.

Plea; That after the said commitment of the said J. Noel to the custody of the defendant in execution as aforesaid, to wit, on the 16th of April, 1838, aforesaid, he, the said J. Noel, wrongfully, privily, and without the knowledge, permission, or consent of the defendant, escaped from and out of the custody of the defendant as such Marshal as aforesaid, to places to him, the said defendant, unknown, without the knowledge, permission, or consent of the defendant; and the defendant, in fact, further saith, that the said J. Noel afterwards, and before the commencement of this suit, and before the defendant had notice or knowledge of such escape, or of the said J. Noel being out of the custody of this defendant, as in the declaration mentioned, to wit, on the day and year last aforesaid, voluntarily, and of his own accord, and without the knowledge of the defendant, returned back again into the custody of the defendant as such Marshal; and that he, the said defendant, did thereupon then keep and detain, and always from thence

hitherto hath kept and detained, and before and at the time of the commencement of this suit kept and detained, and still doth keep and detain the said J. Noel in the custody of him, the defendant, as such Marshal, in execution, at the suit of the plaintiff, &c. And the defendant further saith, that he, the defendant, had not any knowledge or notice of the said escape, or of the said J. Noel being out of the custody of the said defendant during the said time or any part thereof, whilst the said J. Noel was so out of the custody of the said defendant, and had escaped as above, in the said declaration in that behalf complained. (a)

Replication ; *de injuriâ*.

The plaintiff delivered a particular of the time and place at which the alleged escape took place, stating that the time was between the hours of eight o'clock in the evening of Monday, the 16th of April 1838, and three o'clock on the following day, and that the place was in or about Greenwich, in the county of Kent.

The cause was tried before *Erskine*, J., in London, on the 7th of July, 1840, when evidence was given by the defendant in support of his plea, to show that the prisoner, John Noel, had returned to custody after his escape on the 16th of April, and before the 21st of that month, on which day the present action was commenced. The plaintiff then sought to put in evidence that Noel had escaped again in the month of May, after action brought, to the reception of which the defendant objected. The learned Judge was of opinion, that all evidence was inadmissible, which was adduced with a view to shew any escape after the suit was commenced, and the jury eventually found a verdict for the defendant.

Spankie, Serjt., in Michaelmas Term, (in the absence of *Andrews*, Serjt.), moved for a rule calling upon the defendant to shew cause why that verdict should not be set aside, and a new trial had, on the ground that the evidence ten-

1841.
DAVIS
v.
CHAPMAN.

(a) Vide, *ante*, vol. 7, p. 429 ; 7 Scott, 458 ; 5 Bing. N. C. 453, S. C.

1841.

DAVIS

v.
CHAPMAN.

dered had been improperly rejected; of misdirection on the part of the learned judge, in telling the jury that the occurrences subsequently to the 21st of April formed no part of the evidence for their consideration: and also that the verdict was against evidence. It was urged that the terms of the plea rendered admissible the evidence which had been rejected. The words which were employed in alleging that the defendant had detained Noel in his custody after his first escape, and "from thence hitherto hath kept and detained him, and still doth keep and detain him," must be taken to refer, not to the date of the commencement of the suit, but to the date of the plea. It might be, that the defendant, in making that allegation, had stated his defence too largely, but having selected his own terms he must abide by them; and the plea would be only satisfied by proof to the extent suggested, and shewing that the detention had been continuous up to the time of plea pleaded; and at all events evidence offered by the plaintiff to contradict the statement made ought not to have been rejected.

The COURT having granted the rule,

Talfourd, Serjt., *Channell*, Serjt., and *Hoggins*, now shewed cause. It was sufficient, under the terms of the plea, to shew that Noel had been detained in custody up to the time of the commencement of the suit, *Griffiths v. Eyles*. (a) The allegation that the defendant had "hitherto" detained him in custody was immaterial, and if the defendant proved that which was his substantial defence it was sufficient, *Chambers v. Jones* (b), *Spilsbury v. Micklethwaite* (c), *Atkinson v. Warne* (d), *Jones v. Sir W. Clayton* (e). It was not because some unnecessary fact was alleged in the plea that the defendant was bound to prove it, and evidence offered to contradict such a fact was equally useless, and therefore inadmissible. The real ground on

(a) 1 B. & P. 413.

(b) 11 East, 406.

(c) 1 Taunt. 146.

(d) 1 C., M. & R. 827.

(e) 4 M. & S. 349.

which the action was founded was shewn by the terms of the particular, and the Court would not, therefore, allow this objection to prevail. [*Tindal*, C. J.—Could the plaintiff have replied to this plea, that since the action was commenced, there had been a new escape?] He could not. *Jones v. Pope* (a) was also referred to.

1841.
 DAVIS
 v.
 CHAPMAN.

Andrews, Serjt., (with whom was *Wordsworth*). The terms of the plea distinctly extended the time within which Noel's absence from custody might be proved, up to the period of plea pleaded, by the introduction of the words alleging that the defendant had detained him *hitherto*, from the time of his returning into custody. [*Erskine*, J.—Does *de injuria* put in issue anything more than the essential allegations of the plea?] The evidence tendered might have been advantageous to the plaintiff, as shewing that some conversations had arisen with respect to the second escape, in which the defendant had admitted his knowledge of that which had first occurred. [*Erskine*, J.—That was not suggested at the trial.] The defendant, at all events, had taken upon himself to allege too much in his plea, and he must be bound by his own statement of what his case was. (The learned counsel on both sides argued also upon the third point, on which the rule had been obtained, that the verdict was against evidence; but it is unnecessary to repeat their observations here).

TINDAL, C. J.—As to the first ground of objection in this case, it appears to me, that the plea is to be taken as speaking as to what had occurred only up to the time of the commencement of the suit. The plaintiff brings his action for an injury sustained by him, and the plea alleges that the plaintiff ought not to have or maintain his suit, by reason of the justification which it sets up. It is clear that the defendant could not make his case better by what has taken

(a) 1 Wms. Saund. 34 & 37.

1841.
DAVIS
v.
CHAPMAN.

place since action brought ; and it would be a little singular if the plaintiff, on the other hand, by reason of incautious words, which have crept into the plea, should be entitled to make his case better, by giving something in evidence which has occurred since he began his action. I admit that these words might have been omitted, but the replication of *de injuriâ* only puts in issue so much of the justification as is material, and what has occurred since action brought is certainly not material. To try the question by another test ;—could the plaintiff have replied this subsequent escape ? No one will say that he could, and if he could not do that, how could he give the same matter in evidence ? How unjust it would be that he should do so ; because, if the plaintiff would not be permitted to reply to it, in which case, the defendant might have an opportunity of excusing the act alleged, how should he be entitled to give it in evidence, when no such opportunity would be afforded ? Secondly, it is said that the plaintiff was entitled to give this evidence, in order to show the knowledge of the defendant of the former escape of the prisoner. It seems to me, however, that it would be wholly irrelevant to that question, and I cannot see that it throws any light upon it. As to the third point, the application for a new trial, on the ground that the verdict is against evidence, I think that we should not be justified in interfering. The whole matter was fully left to the jury, who have disposed of it, and I am not prepared to say that they have come to a wrong conclusion.

BOSANQUET, J.—I am of the same opinion. The voluntary return of the party in this case to the custody of the defendant, before the action brought, is a sufficient defence to the suit. It is true that the pleader has not contented himself with stating the return of the prisoner, and his detention up to the time of action brought, but he has gone on to say that he has been hitherto and still is detained in custody. But these additional circumstances are not at all necessary to the defence ; they are altogether superfluous ;

and it appears to me that the replication of *de injuriâ* being put on the record, it only puts in issue that which is material to the defence, and does not put in issue the superfluous matter, which is unnecessarily added. I do not think that sufficient has been shewn to warrant the admission of this evidence on the suggestion, that it might tend to prove the knowledge of the defendant of the original escape.

1841.
 DAVIS
 v.
 CHAPMAN.

COLTMAN, J.—I apprehend that the substantial matter of defence in this cause is, that the party returned to the custody of the defendant after his escape, and that the latter detained him from thence until the time when the action was commenced. That was all that it was necessary for the defendant to allege, and the latter portion of this plea is quite immaterial, and forms no part of the substantial defence. It was not at all incumbent on the defendant to make out that portion of the allegations of his plea, and that being the case, the complaint that the evidence was rejected on the ground that it was inadmissible, as tending to contradict an immaterial allegation, cannot be supported. It seems to me, therefore, that if evidence is tendered to prove an immaterial fact, the rejection of that evidence is no ground for a new trial.

ERSKINE, J.—It appeared to me at the trial, that the substance of this plea, with respect to the detention of Noel after his escape, was that the defendant kept him in custody up to the time of the commencement of the suit. All evidence to show that he was not continuously in the custody of the Marshal after that time, therefore, was irrelevant, unless for the purpose of showing some previous knowledge on the part of the defendant. If my attention had been called to any suggestion, that the absence of Noel on the 18th of May had led to a conversation with the defendant, tending to shew a previous knowledge of the Marshal, I should have thought it admissible, as a means of introducing such a fact, but I do not recollect that such was the case, or

1841.

DAVIS
v.
CHAPMAN.

that such a fact was attempted to be shewn. I have always understood that the replication *de injuriâ* only puts in issue the material allegations of the plea—those facts which are essential to the validity of the defence; but undoubtedly the fact here sought to be proved could not come in question under the plea. As to the question of the new trial, upon the ground that the verdict is against evidence, I think that the evidence was for the jury to decide upon, and that they have not come to an erroneous decision.

Rule discharged.

LEWIS v. HOLDING.

A feigned issue having been directed under the Interpleader Act, to be tried in respect of five horses, seized under a *fi. fa.*, issued at the suit of L. against H., in which L. was defendant, and T., the claimant, was plaintiff, the jury found that T. was entitled to two of the horses, and L. to the remaining three; T. thereupon applied to the Court for the general costs of the trial, and also of taking so much of the produce of the sale of the horses to which he had been declared to be entitled out of Court, and of the original motion: The Court directed that the Master should inquire into the amount of costs incurred by each party with regard to his respective claim, and should balance one against the other, and that the party in whose favour the balance arose should be entitled to the amount thereof from the other: they also directed that L., the defendant in the issue, should pay the costs of the original application to the Court for the issue; but as the claimant had asked too much in claiming the general costs of the cause, they refused to order the costs of the motion to be paid to him.

HALCOMB, Serjt., moved for a rule, calling on the plaintiff to shew cause why he should not pay to one Thompson, the plaintiff, in an issue directed by this Court to be tried under the Interpleader Act (1 & 2 Wm. 4, c. 58), the costs of the trial of that issue, and also the costs of an application to the Court to take the proceeds of the sale of certain horses which had been seized in the possession of the defendant Holding, and to which Thompson had substantiated his claim out of Court, and also the costs of this application. It appeared, that the plaintiff Lewis had brought an action against the defendant Holding, and had recovered judgment against him, on which he sued out a writ of execution, and five horses and other property were seized by the sheriff. Thompson thereupon set up a claim to the whole of the horses, and the sheriff having applied to a Judge under the 6th section of the Interpleader Act, an issue was directed by *Coltman*, J., pursuant to 1 & 2 Vict. c. 45, s. 2,

to be tried between Thompson and Lewis, the former being ordered to stand in the position of plaintiff, and the question to be tried, "whether the said five horses, each and every of them, is or are the property of the plaintiff." Thompson and Lewis each asserting his right to all of them. This issue was tried before *Tindal*, C. J., when a verdict was returned by the jury for Thompson as to two of the horses, and for Lewis as to the other three. The horses had been sold under an order of a learned Judge, and the sum of 73*l.* 4*s.*, the proceeds, was paid into Court; the object of the present rule was to secure to Thompson his costs of the trial of the issue as well as the costs of the application to the Court, to take out his share of the money produced by the sale. The case of *Staley v. Bedwell* (a), was cited in support of the motion.

1841.
 }
 LEWIS
 v.
 HOLDING.

Talfourd, Serjt., on a subsequent day shewed cause. The Court had already given their decision upon the question sought to be raised by this rule in the case of *Carr. v Edwards* (b), and they would not alter the determination at which they had arrived. There, in a feigned issue, directed under the Interpleader Act, the plaintiff claimed 182*l.*, and recovered only 50*l.*, and a Judge at Chambers, in the exercise of the discretion given to him under the statute, ordered each party to pay his own costs, and the Court refused to set aside that order. And *Maule*, J., there observed, "It is found in this case, that the plaintiff is only entitled to a sum less than the third part of the amount claimed, and that the defendant is entitled to a great deal more, and it seems to me, that the order is both reasonable and just. Had it been what it is contended, it should have been (an order upon the defendant to pay the plaintiff's general costs), I think it would have been neither the one nor the other." In the case of *Staley v. Bedwell*, an interpleader rule directed the sheriff to sell the goods claimed,

(a) 10 Ad. & Ell. 145; 2 Per. & Dav. 309, S. C.

(b) *Ante*, vol. 8, p. 29; 8 Scott, 337, S. C.

1841.

LEWIS
v.
HOLDING.

and pay the proceeds into Court to abide the event of an issue between the claimant and the execution creditor to try the right to them. The jury, on the trial of the issue, found that part of the goods were the sole property of the claimant, and the residue the joint property of the claimant and the party levied upon; and it was held, that the claimant was entitled to be paid by the execution creditor the general costs of the feigned issue, deducting the costs of the issues found for the latter, and also the costs of appearing to the interpleader rule, and of his subsequent application for the money paid into Court, and for his costs. That case, however, differed materially from the present, and the decision of the Court directly proceeded upon the peculiar circumstances which were there involved. In *Carr v. Edwards*, therefore, the principle now contended for was set up, but was directly discountenanced by the Court, while in *Staley v. Bedwell*, the Court of Queen's Bench had not assented to it. But besides the course proposed to be adopted, of giving a partially successful party the general costs of the trial, another principle had been followed by the Court of Exchequer, of distributing the costs in proportion to the finding of the jury for the respective parties. In a case of *Soames v. Andridge* (a), which occurred in Michaelmas Term 1839, a rule had been made absolute in accordance with this principle. There, it appeared, that Mr. Andridge had lived with a person who passed as his wife at Finchley, and having contracted some debts there, one of which was the subject of the action, they removed to Kennington. Judgment having been recovered against Mr. Andridge, a writ of *fi. fa.* was issued, and the sheriff seized some goods in a house occupied by the female, who, however, now passed under the name of Davis. Mrs. Davis stated that Andridge was her lodger, and set up a claim to all the goods, and an issue was directed to be tried. Subsequently Mrs. Davis

(a) Not reported.

withdrew her claim to a portion of the goods, consisting of wearing apparel, but at too late a time for the admission to be available, and the issue went down to trial in respect of all the goods seized. Mrs. Davis substantiated her claim to all the goods except those to which she had admitted she was not entitled, and the jury returned a verdict accordingly. On an application being made to the Court of Exchequer, they granted a rule directing the costs to be taxed as upon two issues, each party to be allowed the costs in respect of the goods on which he had succeeded, the costs of the interpleader rule being also ordered to be divided between the parties in the same proportions as the counts found for the claimant and the execution creditor bore to each other. The Court would now adopt this course in preference to taking that which was evidently unjust, and by which they would compel the party who had succeeded to the greater extent to pay the costs of the person who had recovered to the smaller amount. The learned serjeant, however, suggested that the proper course would be for each party to pay his own costs.

1841.
—
LEWIS
v.
HOLDING.

Halcomb, Serjt., declined to accept these terms, and hoped that the Court would lay down some rule by which future cases might be governed. He contended, that the rule deducible from the decision in the case of *Staley v. Bedwell*, was that the person in the situation of Thompson, who had succeeded in recovering that which was denied to be his by Lewis, who was, in fact, a wrong-doer, as far as Thompson was concerned, was the substantially successful party, and was entitled to his general costs. That case was argued and decided upon the principle of its being like an action of trover, and the Court would have no hesitation in adopting that which must be admitted to be the most convenient rule. The case of *Carr v. Edwards* arose under the first section of the act, while this case was under section 6, and the real ground of that decision was, that the Court would not interfere with the decision of the Judge,

1841.

LEWIS
v.
HOLDING.

who had already made an order. *Soames v. Andridge* appeared to have been decided upon the ground that Mrs. Davis was perfectly aware that that portion of the goods, in respect of which she had to pay the costs, was not her own, although she set out by defending her right to them. The Court possessing a discretion upon the question of costs under the statute, they would take the real justice of the case into their consideration. It was to be observed, that the hardship was entirely on the claimant, who was deprived of the possession of his own goods, and by a forced sale, had been materially injured in his interests.

TINDAL, C. J.—The costs, which are the subject of this application, may be divided into three heads:—first, those incurred before the feigned issue was granted; secondly, those of the trial of the issue; and, thirdly, those of the present application. I will consider those which relate to the trial of the feigned issue first, because they are the most important upon this occasion. In this case, the plaintiff in the issue, who is the claimant, sets up his right to five horses, and the defendant denies that he has a right to any, and the parties go down to trial, and the plaintiff proves his right, and the jury find a verdict for him as to two of the horses, but find for the defendant as to the other three; evidently shewing that on the one side the plaintiff claimed too much, and that on the other side, the defendant defended too much. The plaintiff should have limited himself to that which the jury found he was justly entitled to, and the defendant should also have limited his defence to the three horses, and have given up the other two to the plaintiff. Each, therefore, has claimed too much, and it seems to me, that under these circumstances, neither is entitled, nor can be entitled to the whole of the costs of the trial. I cannot consider this case as being exactly on the footing of an action of trover, where, by the strict rule of law, if the plaintiff recover only a part of his demand, he is entitled to the whole costs. Costs were originally given

by the statute of Gloucester, and the provisions of that act have since been extended by a legislative enactment which have been held to establish this rule, but I cannot believe that it was the intention of the Interpleader Act, that costs attending the investigation of a claim between adverse parties, should be subjected to so strict and rigid a rule. The first section provides, that upon application made by or on behalf of a defendant in any action of assumpsit, debt, detinue, or trover, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed by some third party who has sued, or is expected to sue for the same, "it shall be lawful for the Court, or any judge thereof, to make rules and orders, calling upon such third party to appear and state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order, to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, &c., to dispose of the merits of their claims, &c., in a summary manner, and to make such other rules and orders therein as to costs and all other matters, as may appear to be just and reasonable." This clause, therefore, evidently gives the Court a much wider discretion than it could have in an action of trover. Section 6 provides for a sheriff's case, and after reciting that difficulties arise in the execution of process against goods, issued under the authority of the Court, by reason of claims made to the same by persons not being the parties against whom such process has issued, and that it is reasonable to afford relief to sheriffs and other officers in such cases, enacts that when any such claim shall be made to any goods or chattels

1841.

LEWIS

v.

HOLDING.

1841.

LEWIS
v.
HOLDING.

taken under any process, it shall be lawful for the Court, upon application by the sheriff, to call before them as well the party issuing such process as the party making such claim, and thereupon to exercise for the adjustment of such claims, &c., all or any of the powers hereinbefore contained, and "to make such rules and decisions, as shall appear to be just according to the circumstances of the case: and the costs of all such proceedings shall be in the discretion of the Court." Now it seems, therefore, that the Court has a discretion which will always be governed by the circumstances of each case, and mainly and principally by the finding of the jury, upon the apportionment of the costs; and I think it will be a fair, and equitable, and reasonable decision in a case like this, where the plaintiff claimed five and recovered only two, and the defendant defended five, and proved his defence only as to three, that the Master should look to the costs on both sides, and see how much of them was incurred by the plaintiff in respect of his case as to the two, and how much by the defendant in making out his title to the three, and balance one against the other, and that the party in whose favour the balance arose, should be entitled to the amount of such costs. He should look to see how much was incurred as to the two, and how much as to the three, and then he will come to a just and fair decision between the parties upon the aggregate of the amount, and see how much should be imposed upon the plaintiff, or how much should be borne by the defendant. Upon the question of the costs of the proceedings before the feigned issue was granted, it seems to me that they refer to an application which the claimant was compelled to make to the Court, in order to raise his claim; and those expenses, which are no greater for the plaintiff having demanded more than he was entitled to, should be borne by the defendant, the claimant having succeeded as to a part of his demand. As to the costs incurred subsequently to the trial, the claimant, it is to be observed, was in some respects compelled to come to the

Court, because the statute leaves the question of costs in the discretion of the Court; but as he has claimed more than he is entitled to, I think that no costs should be allowed on either side.

1841.

LEWIS

v.

HOLDING.

BOSANQUET, J.—A discretion upon the question of costs under this statute is vested in the Court, which is authorized to apportion them in such a manner, as is applicable upon the result of the proceedings, for the purpose of ascertaining the amount of the claim of the respective parties. In this case, it turns out that each party is partly right and partly wrong, and I think that my Lord has justly stated the rule which should be applied to this case.

COLTMAN, J.—concurred.

ERSKINE, J.—I am of the same opinion. The costs in this case ought not to be appropriated between the parties by any arbitrary rule, but according to the circumstances which have appeared in the course of its investigation, and I think that the rule pronounced by my Lord in this case is the best.

Rule accordingly.

HARDING v. HOLDER.

LUDLOW, Serjt., moved for a rule, calling upon the plaintiff to shew cause, why a rule to return a writ of testatum fi. fa. which had been served upon the sheriff of Gloucestershire, should not be set aside. The affidavit stated that on the 8th of April, the writ was brought to the office of the undersheriff by one Anthony Bretherton, a bound bailiff of the late sheriff, who produced at the same time to the under-sheriff an indemnity from the plaintiff's attorney

The general rule is, that where a plaintiff appoints a special bailiff, he cannot rule the sheriff to return a writ of fi. fa.: but where such a rule has been obtained, and the object was to procure a return of nulla

bona, with a view to sue out a writ of ca. sa., the Court discharged a rule obtained on the part of the sheriff to set that rule aside, upon payment of costs by the plaintiff, the plaintiff also undertaking not to bring an action.

1841.

HARDING
v.
HOLDER.

to him, for the appointment of Bretherton as special bailiff. It was urged that this was a sufficient ground to induce the Court to discharge the rule, which had been granted, and *De Moranda v. Dunkin* (a), was cited. A seizure had been made by the sheriff in another action, upon a writ previously lodged, the proceeds of which he had paid over to the plaintiff in that suit.

Bompas, Serjt., on a subsequent day, shewed cause. The object of the rule to return the writ, was to procure a return of nulla bona, in order that the defendant in the action might be taken upon a ca. sa. *Alchin v. Wells* (b), *Hodges v. Jordan* (c), were cases of compromise, and *Pallister v. Pallister* (d), and *Porter v. Viner* (e), shewed that the sheriff could not be made responsible. [*Tindal*, C. J.—Could you not bring your action on the return of nulla bona, as being a false return?] The fact of the appointment of a special bailiff by the plaintiff, would be an ample answer to such a suit. [*Tindal*, C. J.—It is a general rule, that where the sheriff does not act by his own bailiff, but a special bailiff is appointed by the plaintiff, he cannot be called upon to return the writ?] *De Moranda v. Dunkin*, did not apply to this case. There was no doubt that in the case of an escape, where that escape was the result of the act of the plaintiff's special bailiff, the sheriff could not be ruled to return the writ.

TINDAL, C. J.—The general rule which I have referred to, is laid down in *Hamilton v. Dalziel* (f). If you had written to the sheriff, and told him what you wanted, and the object you had in desiring the writ to be returned, the case would have been different. On your undertaking not to bring an action, and on payment of costs, this rule may be discharged.

Rule accordingly.

(a) 4 T. R. 119.

(b) 5 T. R. 470.

(c) *Ante*, vol. 5, p. 6.

(d) 1 Chit. Rep. 614, n.

(e) *Ib.* 513, n.

(f) 2 W. Bl. 952.

1841.

Re W. TUCKER.

HALCOMB, Serjt., moved for a rule that Mr. William Tucker might be re-admitted an attorney of this Court. He had, in Hilary Term, obtained the necessary rule upon what he had deemed the usual affidavits, but it was found, by the Master, that there was no affidavit of notice of the application having been stuck up in the office of the Chief Justice. On the 8th of April, therefore, (five days before the commencement of the present Term, this motion being made on the 15th of April,) notice was stuck up in conformity with the practice, and the usual affidavit being now produced, it was submitted that the Court would grant this application.

Upon an application for the re-admission of an attorney, the Court will not dispense with the notice required to be stuck up in the office of the Chief Justice. So where the notice had been stuck up five days before the commencement of Term, and the application was made on the first day of Term, the Court refused to grant the rule.

TINDAL, C. J.—The object of the notice was, that parties might have an opportunity of looking into the proceedings of the attorney, with a view to oppose his re-admission, in case of necessity. I do not see how that object can be said to be attained by the notice which has been given in this case. You had better apply again.

On the last day of Term, the application was renewed, and the Court granted the rule.

Rule accordingly.

MORRIS v. COX.

THIS was an action brought by Anthony Morris, an infant, through Elizabeth Morris, his guardian, against the de-

bound to serve his Master for five years and a half; a deed of assignment transferred the services of the apprentice to a new master for the remainder of the term of five years and a half, and the deed recited that instead of providing the apprentice with certain wages, stipulated for in the original indenture, the new master would find him in food, lodging, and washing, for the remainder of the said term, and one year more; the deed then bound the apprentice to his new master for that additional term: *Held*, that under the provisions of the Stamp Act, (55 Geo. 3, c. 184,) the deed of transfer was liable only to 1*l.* assignment stamp, and that no additional duty was payable on the creation of the new term of service.

By an indenture of apprenticeship, the apprentice was

1841.

MORRIS
v.
COX.

fendant, for a breach of the covenants of an indenture of apprenticeship. The declaration stated, that by a certain indenture, (bearing date the 28th of April 1835), sealed with the respective seals of the plaintiff, the said Elizabeth Morris, and one Jacob Bond, which the plaintiff now brings into Court, &c., it was witnessed that he, the plaintiff, did put himself apprentice to the said Jacob Bond, to learn his art, and with him, after the manner of an apprentice, to serve from the 20th day of April 1835, unto the full end and term of five years and a half from thence next following, to be fully complete and ended, during which term the said apprentice his master should faithfully serve, &c., &c. And the said Jacob Bond did by the said indenture covenant and agree, that he, his said apprentice, in the art of Tailoring, which he used, by the best means that he could, should teach and instruct, &c.; and the plaintiff in fact says, that he, the plaintiff, forthwith after the said indenture, to wit, upon the day and year first aforesaid, entered into, remained and continued in such service for a long space of time, to wit, from thence until the making of the indenture hereinafter mentioned, to wit, dated the 8th of November, 1838. And the plaintiff further says, that afterwards, to wit, on the day and year last aforesaid, by a certain other indenture then made, and sealed with the respective seals of the defendant, the plaintiff, the said Jacob Bond, and the said Elizabeth Morris, which indenture so sealed the plaintiff now brings here into Court, after reciting, that the parties to the indenture first above mentioned, had mutually agreed that the said apprentice should be assigned to the defendant. It was witnessed, that the said Jacob Bond, at the request and by and with the approbation of the plaintiff, and the said E. Morris, did grant, assign, and turn over the plaintiff to the defendant, to serve him as his apprentice, under the conditions and according to the terms of the first mentioned indenture, saving and except, that instead of the defendant paying plaintiff part of his earnings, he, the defendant should find the plaintiff in food, lodging, and clothing, from the

1841.

MORRIS

v.
COX.

day of the date of the said indenture, in this declaration secondly mentioned, for the remainder of the said term of five years and a half, and for one year more, and the defendant did by the said indenture, &c., covenant and agree, &c. Breach.—That the defendant, &c., before the expiration of the said term, to wit, &c., against the will of the plaintiff, dismissed and discharged him from his service, and neglected and refused to teach or instruct, or cause to be taught and instructed, the plaintiff in the said art, &c. The defendant pleaded that the deed was not his deed, whereupon issue was joined. The cause was tried before *Ers- kine, J.*, at Westminster, at the sittings after Trinity Term, 1840, when the indenture of apprenticeship was put in. The original indenture was in the usual form, and bore a 1*l* stamp, and at the back of it was written, in the hand- writing of the defendant, the indenture upon which the pre- sent action was brought, in the following terms: Whereas the within-named parties have mutually agreed that the within-named apprentice shall be assigned to Thomas Cox, of Southampton Street, Strand, in the county of Middlesex, Tailor; now, therefore, it is hereby witnessed, that the within-named Jacob Bond, at the request, and by and with the approbation of the within-named Anthony Morris, and Elizabeth Morris, (testified by their being parties to and executing these presents), hath granted, assigned, and turned over, and by these presents doth grant, assign, and turn over the said A. Morris to the said T. Cox, to serve him as his apprentice, under the conditions, and according to the terms within-mentioned, saving and except, that in- stead of the said T. Cox paying the said A. Morris a part of his earnings, he, the said T. Cox, shall find the said A. Morris in food, lodging, and clothing, from the day of the date hereof, for the remainder of the within mentioned term of five years and a half, and one year more. And the said T. Cox doth hereby covenant and agree, in consideration of 5*l*., and the future-services of the said apprentice, to accept, take, and receive him, the within-named A. Morris, to be,

1841.

MORRIS

v.

COX.

remain, and continue as his apprentice during the remainder of the within-mentioned term, and under the conditions before named, and shall teach and instruct, or cause to be taught and instructed, the said apprentice in the art, mystery, and trade of a Tailor, which he now useth, according to the said indentures: In witness whereof, &c.” It appeared that this indenture was not stamped at the time of its execution, but a 1*l*. stamp had since been placed upon it. An objection was now raised on behalf of the defendant, that this stamp was insufficient under the terms of the Stamp act, (55 Geo. 3, c. 184, sched., part 1), for that the instrument not only assigned the apprentice to a new master, for the remainder of the already existing term of five years and a half, but created a new term of one year more, in respect of which new covenant, a further duty was payable. The learned judge overruled the objection, but gave the defendant leave to move to enter a nonsuit, and the jury found for the plaintiff, damages 10*l*. 16*s*.

Bompas, Serjt., in Michaelmas Term, obtained a rule for setting aside the verdict, and entering a nonsuit, against which

Talfourd, Serjt. now shewed cause. The instrument might be treated either as a new indenture of apprenticeship, or as an assignment of the remainder of the already existing term, and in either case the stamp which it bore was sufficient. It was erroneously construed, when it was said that it created any new term; for the effect of it in this respect was only that the new master, in consideration of the services of the apprentice, should provide him with food, lodging, and clothing beyond the term of the original apprenticeship. The case of *The King v. The Inhabitants of Louth* (a), was in point.

(a) 8 B. & C. 247; 2 M. & Ry 273. S. C.

Bompas, Serjt., in support of the rule. The instrument required two stamps, one in relation to the assignment of the apprentice, the other upon the creation of a new term of apprenticeship, of one year beyond that which existed under the original indenture. All the interest of the old master was conveyed to the new master, but beyond this interest there was a new interest created. A distinction was maintained throughout the Stamp Act, between assignments, and new indentures, and as this instrument was in effect both an assignment and a new indenture, it ought to bear a stamp in respect to each of its provisions, as much as if those provisions had formed the subject of separate instruments. [*Coltman*, J.—Might not the parties, without any evasion of the Stamp Laws, have destroyed the original instrument, and then have executed a new deed of apprenticeship, by which the apprentice might have been bound for the additional year; and would more than a 1½ stamp have been required in that case?] The parties had not adopted that course, and if they had chosen to include the double object in one instrument, they must take the consequences of their own act.

1841.

MORRIS

v.
Cox.

TINDAL, C. J.—Unless the additional stamp is clearly imposed upon the instrument by the very terms of the Stamp Act, I think that we should not yield to this objection, and on looking at the words of the Act, it appears to me, that there is no necessity for the double stamp. The words are, “Indenture or other instrument in writing, containing the covenants, articles, or agreements, for or relating to the service of any apprentice, clerk, or servant, who shall be put or placed to, or with a new master or mistress, either by assignment, transfer, or turn over, or upon the death, absence, or incapacity of the former master or mistress, or otherwise, or any writing whatsoever, whereby any such assignment, transfer, or turn over may be effectuated or ascertained.” Now I cannot help thinking that no other words would have been used, beyond the mere word “as-

1841.

MORRIS

v.
COX.

signment," unless it was intended by the legislature that there might be in the assignment some new terms created upon the taking of the apprentice by the new master; and the use of these various words "assignment, transfer, or turn over," coupled with the previous description of the instrument describing it as containing the covenants, articles, or agreement relating to such assignment, &c., seems to imply this. The word "assignment" alone would have confined the operation of the Act to the simple relation as it existed between the old master and the apprentice, but where you find all these words employed, I think that we are justified in drawing the conclusion that they may include the introduction of some new terms in the deed with the new master, and that it is sufficient, that in this case the same stamp is imposed as that which is stated to be requisite upon an assignment, transfer, or turn over, under the terms of the statute.

BOSANQUET, J.—I also think that it is clear that the second stamp which it is contended ought to have been placed upon this deed, is not necessary, unless it obviously appears from the words of the statute that it is imposed. The substance of this transaction is this; that when the apprentice has served his first master, during a certain specified period, a new agreement is entered into, by one instrument, the effect of which is to put the apprentice to serve a new master for the remainder of the period for which he was bound to serve his old master, and one year more, making the deed of apprenticeship for five years and a half, plus one year, which will make it six years and a half altogether. The question is, whether, by the terms of the act of parliament, a second stamp is expressly required? This is an indenture in writing, containing "covenants, articles, or agreements," concerning an apprentice put to a new master, whereby a "transfer, assignment, or turn over," is effected, and on this a 1½ stamp is imposed. It seems to me, that it is not required by this act, that there should be, first of all

a stamp imposed for the transfer of the apprentice, for the residue of the term of five and a half years, and then an agreement stamp of 1*l*. for the additional term of one year, contended for, but that the one stamp is sufficient.

1841.

MORRIS
v.
COX.

COLTMAN, J.—It appears to me, that the intention of this act does not comprehend only what may be called a bare and mere assignment, because it authorizes for the 1*l*. stamp the introducing of covenants, articles, and agreements relating to the service of the apprentice, which may vary from the original covenant. If so, a bare assignment only is not contemplated, but new terms, varying the original contract, may be introduced. If, indeed, the effect of the adoption of this principle was to produce any evasion of the act, it might give rise to some doubts, but it seems to me, that it is clear, that if the parties had agreed to cancel the original agreement, by taking off the seal, they would have destroyed its effect, and a new indenture might have been executed, for which a 1*l*. stamp only would have been necessary, and which would have been unimpeachable.

ERSKINE, J.—I am also of opinion, that the legislature did not contemplate a mere assignment in imposing this duty, but intended that it should cover all such new terms, upon which the apprentice might be turned over from the first to the second master, and I think that this deed is sufficiently protected by the imposition upon it of the same duty as would have been required upon the original binding.

Rule discharged.

SHIRER v. WALKER.

BOMPAS, Serjt., showed cause against a rule which had been obtained in this suit, for rescinding an order to hold to

It is now an established rule that affidavits sworn

by the plaintiff or defendant in the cause, are excepted from the operation of Rule 5, of H. T., 2 Wm. 4, and that the addition and degree of such persons need not be inserted in the description of the deponent, but they may describe themselves as such plaintiff or defendant respectively.

1841.

SHIRER

v.

WALKER.

bail made by *Alderson*, B. at Chambers, on the 11th of March, 1841. He took a preliminary objection to the affidavit on which the rule had been obtained. It purported to be sworn by the defendant in the cause, who, however, was not described by any other title or addition. He contended that this was insufficient. The rule of H. T., 2 Wm. 4 (a) was positive in its provisions, that "The addition of every person making an affidavit shall be inserted therein." There appeared to have been much diversity of opinion in the various courts, as to the proper construction to be put upon this rule. The rule in the King's Bench, of M. 15, Car. 2 (b), directed that the names of the deponent or deponents must, in every instance, be stated fully, and not by initials, or any contraction of the first or other names, or if the true place of abode is not stated, it will vitiate the affidavit. From an *Anonymous* case (c), decided under the old rule, it appeared that a difference existed between the practice of this Court, and the Court of King's Bench; for there, it was held that an affidavit in support of a motion made in the course of a cause, which stated the abode of the defendant, and styled him defendant, was sufficient, though it did not contain the addition of his degree; and the Court then observed that there was no rule in this Court, as there was in the King's Bench, specially requiring the addition of deponents. In *Lawson v. Case* (d), the Court of Exchequer held that the rule of H. T., 2 Wm. 4, required the addition of all persons, whether parties to the suit or not; and in *Brooks v. Farlar* (e), the same decision was arrived at by this Court, after the case of *Poole v. Pembrey* (f) had been cited. In *Sharp v. Johnston* (g), the deponent to an affidavit was a prisoner in the Fleet, and the Court held that a description of him in the affidavit as such prisoner was suf-

(a) *Ante*, vol. 1, p. 184.(b) *Petersdorff's New Abr.* p. 120; *Jerv. Rules*, 58.(c) 6 *Taunt.* 73.(d) *Ante*, vol. 2, p. 40, S. C. 1 C. & M. 481.(e) 3 *Scott*, 654, S. C. *Ante*, vol. 5, p. 361.(f) 1 *Tyr.* 387, S. C. *Ante*, vol. 1, p. 693.(g) 2 *Bing. N. C.* 246.

ficient. *Tindal*, C. J., stating his opinion that the spirit and terms of the rule should be strictly complied with.

1841.

SHIRER

v.

WALKER.

Talfourd, Serjt., in support of the rule. The strict and literal compliance with the terms of the rule of Court, had been long since dispensed with in cases of plaintiff and defendant deponents. Any reference to the practice before the Rule of H. T., 2 Wm. 4 was out of place here; and since that rule had been promulgated, there were many authorities which clearly established the proposition contended for. *Jackson v. Chard* (a), *Angel v. Ihler* (b), *Poole v. Pembrey*, *Sharp v. Johnston*.

TINDAL, C. J.—It is extremely important that the practice of all the Courts should be alike. We will consult the rest of the judges upon this point.

On a subsequent day,

PER CURIAM. The Judges have met, and they all declare that affidavits sworn by plaintiffs or defendants are exempted from the operation of this rule. It is, therefore, enough in such cases to say, “the above-named plaintiff or defendant,” as the case may be, neither the place of abode nor the addition being necessary.

Upon other grounds the rule was discharged.

(a) *Ante*, vol. 2, p. 469.

(b) 5 M. & W. 163.

WOOD v. MOREWOOD.

M. D. HILL moved for a rule, calling on the defendant to shew cause why a rule nisi, which had been obtained on At the trial of an action of trespass in which the question raised was upon the plaintiff's title to an estate, upon which the trespass was alleged to have been committed, a deed was produced by the plaintiff which came by surprise upon the defendant, who thereupon submitted to a verdict. The defendant having obtained a rule nisi for a new trial upon the ground of surprise, the plaintiff sought to procure a copy of a deed, said to be in the possession of the defendant, and which it was supposed might vary the title set up on the deed produced by the plaintiff at the trial; but it was held that he was not entitled as of right to demand an inspection of the deed; and it appearing that the deed was a public document, the contents of which were set forth on the face of an inquisition, *post mortem*, filed in the Rolls Chapel, the Court refused to compel the production of the original.

1841.
WOOD
v.
MOREWOOD.

his behalf, for a new trial, should not be discharged, unless the defendant delivered to the plaintiff at his (the plaintiff's) cost, a true copy of a certain conveyance executed by one Sir John Zouch in the 30th year of the reign of Queen Elizabeth, within a certain time, antecedent to the day upon which that rule for a new trial would come on for argument. It was an action of trespass; the cause was tried at Derby, before *Tindal*, C. J., when a verdict passed for the plaintiff. The rule for a new trial had been obtained by the defendant, upon the ground of surprise, which consisted in the unexpected production of a certain deed by the plaintiff affecting the title to the property in respect of the trespass on which the action was brought, and upon the legal ownership of which, the rights of the plaintiff and defendant depended. The deed, a copy of which it was the object of this rule that the plaintiff should obtain, was supposed to relate materially to the title of both plaintiff and defendant in reference to the validity of the settlement effected by the prior existing instrument produced by the plaintiff, and the plaintiff having no means of procuring a copy of it, it was submitted that the Court would interfere to place him in such a position as to enable him to know upon what precise grounds his title was to be disputed. This was, in fact, but a renewal of the application made in Michaelmas Term, (a), when the rule was refused upon an understanding that the defendant's deed should be placed in the hands of counsel for inspection, an assurance to that effect having been given by the *Solicitor General*, who was in Court. Applications had since been made to the attorneys for the defendant, who had been called upon to fulfil this undertaking of their counsel, but they had refused to produce the document in question, declaring that the promise made by the *Solicitor General*, was unauthorized by them. Notice had, thereupon, been given to them of this renewed motion. It was contended, that the Court had the power to compel the production of the instrument, and would not hesitate to exercise it. New trials

(a) *Ante*, p. 44.

were not granted *ex debito justitiæ*, but according to the discretion of the Court only, and that which was now demanded, being only a fair and equitable measure to the plaintiff, the Court would not, unless that was granted which was sought to be obtained, permit the defendant to have his rule for a new trial. The plaintiff was entitled to have an opportunity of examining and answering the case sought to be set up by the defendant, upon the hearing of the rule, he could not be fully prepared without having an inspection of the deed. The defendant, it was to be observed, was alleging surprise as the ground on which he sought a new trial, but he was bound, in order to make out that allegation, to bring all the facts upon which that surprise could be proved fully before the Court. The plaintiff might produce affidavits, but they could not apply to the substantial ground of the motion. [*Tindal*, C. J.—The Court is looking at its power to call for the production of this deed. When the case comes on for argument, the deed will be in Court, and if it is necessary upon its production that you should have any affidavits upon that part of the subject, you will have time given to you for that purpose]. The real position of the plaintiff was just as if the defendant pleaded the deed, and did not make profert of it. The Court might save all that delay which would be the consequence of the production of the instrument only at the time of hearing of the rule, by granting the present application. In *Hewitt v. Pigott* (a), where a deed had been produced and read on a trial by one party, the Court compelled him to permit the other party to inspect that deed in case of a new trial.

1841.
 Wood
 v.
 MORKWOOD.

The Court having granted a rule nisi,

The Solicitor General, on a subsequent day, shewed cause. He urged that no sufficient ground for the motion

(a) *Ante*, vol. 1, p. 219, S. C. 7 Bing. 400; 5 Mo. & P. 252.

1841.
 {
 WOOD
 v.
 MOREWOOD.

had been shewn; for that not only was there no statement of there being any real necessity for the production of the deed, but the plaintiff did not even swear that he was ignorant of its contents. The deed, besides, it was now sworn, was a public document, and its contents were fully set forth in the inquisition, post mortem, taken in the reign of James the First, which was duly filed at the Rolls Chapel. The plaintiff had access to that inquisition as well as the defendant, and could as well learn its contents by that means, as by the production of the original.

M. D. Hill contra, contended, that he was still entitled in strictness to have the rule made absolute.

TINDAL, C. J.—I think that the plaintiff has no right to insist upon this deed being produced. It is a public document, and as much open to the plaintiff as to the defendant, and the plaintiff cannot call for the production of the original as a matter of right. This rule must be discharged.

Rule discharged.

WOOLNER and Another v. DEVEREUX.

Where a judge at Chambers had made an order upon the plaintiffs to permit the defendant to inspect and take a copy of a promissory note upon which the action was brought, the Court refused to grant a rule to rescind that order, although it was sworn that no special grounds were stated at Chambers upon which the order was founded.

CHANNEL, Serjt., moved for a rule, calling upon the defendant to shew cause, why an order made by *Alderson*, B. at Chambers, on the 6th of March, should not be rescinded. From the affidavits, it appeared, that a summons was taken out before the learned judge, on behalf of the defendant, calling upon the plaintiff to shew cause why he should not be permitted to inspect and take a copy of the promissory note on which the action was brought on payment of the costs occasioned to the plaintiff by such inspection. When the parties were before the learned judge, it was argued by

that no special grounds were stated at Chambers upon which the order was founded.

1841.

WOOLNER
and Another
v.
DEVEREUX.

the plaintiff that his lordship ought not to make such an order as was desired, unless grounds were stated, upon affidavit, to shew that some necessity existed for the defendant to have a copy of the instrument. But the learned judge stated that that practice was obsolete, that he had made several orders without any such affidavit, and he thereupon made the order in question. It was now urged, that the judge had acted upon an erroneous principle, and that unless some reason had been stated for the application, he ought not to make the order. He cited *Threlfall v. Webster (a)*, *Hildyard v. Smith (b)*, *Lush's Practice*, vol. 2, p. 747, *Chit. Arch.* vol. 2, p. 1023.

TINDAL, C. J.—There is no doubt that the judge has jurisdiction to make such an order, if the circumstances call for it; as, if there is any suggestion of forgery, or that the instrument has been dealt with since it was executed, or where the party swears that he has no recollection that he has made such a note. It does not appear to me, that we ought, in this case, to interfere, by setting aside the order. It was matter which was very much in the discretion of the learned judge before whom the application was made. No doubt, in the course of practice, the habits of learned judges will assimilate, and they will all come to some uniform mode of proceeding; but we cannot, in this case, set aside the order which has been made.

The rest of the Court concurred.

Rule refused.

(a) 1 Bing. 161, S. C. 7 Moore, 559.

(b) 1 Bing. 451, S. C. 8 Moore, 586.

1841.

GRIFFITHS v. ROBERTS.

To an action on an agreement to deliver etchings of certain drawings to be supplied by the plaintiff, the defendant sought to plead, in addition to pleas of non assumpsit, that the plaintiff delivered unfit and improper outlines; that the defendant was prevented by the act of God, from completing his contract, and leave and license, three further pleas, namely, that the plaintiff did not supply the drawings; that the plaintiff neglected to supply the drawings for an unreasonable time after the making of the agreement, and thereby prevented the defendant from delivering the etchings within the specified time; and that the plaintiff delivered the drawings, but that they were unfit and improper for the purpose: The Court refused to allow these three pleas to be pleaded, but gave the defendant leave to select one from among them.

SHEE, Serjt., moved for a rule, calling upon the plaintiff to shew cause, why so much of an order made by *Maule*, J., at Chambers, as directed the defendant to select one of three pleas, which he sought to put upon the record, should not be rescinded, and why the defendant should not be at liberty to plead those three pleas. It was an action on an agreement, by which the defendant undertook to deliver to the plaintiff, within twelve weeks, etchings of certain drawings, to be supplied by the plaintiff, which were intended as illustrations of a work, called, "West Views of London." The pleas which the defendant sought to put upon the record were, first, non assumpsit; secondly, that the plaintiff did not supply the said drawings, as alleged in the declaration; thirdly, that the plaintiff, for an unreasonable time after the making of the alleged agreement, neglected to supply the defendant with the said drawings, and thereby prevented the defendant from etching the same, and delivering them within twelve weeks; fourthly, that the plaintiff delivered to the defendant, for the purpose of his preparing the said etchings, unfit and improper outlines; fifthly, that the plaintiff delivered certain drawings to the defendant, but that they were unfit and improper for the purpose for which they were intended; sixthly, that the defendant was prevented by the act of God, and by illness from delivering the said etchings; and seventhly, leave and license. The learned judge at Chambers had allowed the first, fourth, sixth, and seventh pleas, but rejected the second, third, and fifth, from which, however, he gave the defendant leave to select one. It was now urged that those pleas contained matters of defence, which were distinct in their nature from any others, and all of which were perfectly consistent. [*Tindal*, C. J.—I think you seem to have pleas upon the record already, which will let in all your

defences. Some of those which you propose are directly at variance with others, and although this does not make them bad pleas, it induces the Court to pause before they exercise the discretion with which they are invested. [*Bosanquet*, J.—In the third plea, you say that the drawings were not delivered in a reasonable time: if, as it is said in the second plea, they were not delivered at all, they could not have been delivered within a reasonable time. The allowance of such pleas would entirely defeat the object of the rules of Court of H. T., 4 W. 4., (a)]. There was a wide distinction between the delivery of the drawings within a reasonable time, and the omission to deliver them at all. [*Tindal*, C. J.—By one of the pleas which is allowed, you say, that you were prevented by the act of God from completing your contract. If that is an honest defence, it is a complete answer.] All the pleas might be true, and they fully met the requisites of the rule in respect of the distinct nature of their allegations.

1841.
 GRIFFITHS
 v.
 ROBERTS.

TINDAL, C. J.—These pleas cannot all be true. The object of the Statute of Anne, (4 & 5 Anne, c. 16, ss. 4 & 5) was to give a great advantage to defendants, but the rules of Court of H. T., 4 Wm. 4, interpose the protection of the Court on behalf of plaintiffs, that defendants shall not weave nets, whereby to catch the parties who are suing in respect of remedies for injuries done to them. You may have your choice of one of these three pleas, but you cannot be allowed to plead them all.

The rest of the Court concurred.

Rule refused.

(a) *Ante*, vol. 2, p. 312.



1841.

COCKBURN and Another v. NEWTON.

A cause, and all matters in dispute at the time of an order of reference, were submitted to the decision of an arbitrator, by the order of a judge: The arbitrator awarded, that the defendant should pay to the plaintiff the sum of 184*l.*, for a balance and interest found to be due at the date of the order of reference, "excluding from such an account, a claim on the part of the plaintiffs, for a loss alleged to have been sustained by them to the amount of 32*l.* 19*s.* on certain varnished hats;" and as to the said claim, in respect of the said varnished hats, he found "that no sufficient evidence had been laid before him by the plaintiffs to shew, that at the date of the said order of reference, they

had sustained any loss on the said hats, and upon that ground, and for want of sufficient evidence of such loss, he awarded that the plaintiffs were not entitled under the reference to recover anything in respect thereof:" *Held*, a final adjudication of the matters submitted to reference.

By an order of reference, the costs of the cause were ordered to abide the event of the award; the arbitrator decided the suit in favour of the defendant, and ordered the plaintiff, on a certain day, to pay him those costs: *Held*, no objection to the award, for that the defendant was not deprived of any right which he possessed to recover the costs at an earlier date.

BRAMWELL shewed cause against a rule, which had been obtained by the *Solicitor General*, for an attachment against the defendant for the non-payment of the sum of 184*l.* 2*s.* 1*d.*, awarded by the arbitrator to be paid by him to the plaintiffs. He objected to the sufficiency of the award upon two grounds:—first, that it was not final in its adjudication, and, secondly, that the arbitrator had exceeded his authority in directing the costs of the action to be paid to the defendant on a particular day, although by the order of reference, those costs were directed to abide the event of the suit. The award set out the order of reference, dated the 13th of December, 1839, by which it was ordered, that all matters in difference between the parties in a certain cause depending in this Court, at the time of the order, should be referred to the arbitrament of a learned serjeant, the costs of the cause, including the costs of the application for a special jury consequent thereon, to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator; it then proceeded to state various enlargements of the time for making the award up to the first day of Easter Term, 1841, and continued thus, "Now know all men, that I, the said arbitrator, having heard and examined, and duly considered the allegations and evidence which the said parties have thought proper to lay before me concerning the premises, do make and publish this my award of and concerning the matters to me referred as aforesaid, that is to say, I find that at the date of the said order of reference, there was a balance of 165*l.* 12*s.* 1*d.*, due

1811.

COCKBURN
and Another
v.
NEWTON.

and payable from the defendant to the plaintiffs on the account between them, consisting of the several claims and demands in the particulars of demand, and set-off in the said action respectively mentioned, except and excluding from such account a claim on the part of the plaintiffs for a loss alleged to have been sustained by them to the amount of 32*l.* 19*s.*, on certain varnished hats, and that the plaintiffs are now entitled to recover from the defendant for the said balance, together with interest thereon, the sum of 184*l.* 2*s.* 1*d.* and no more; and as to the said claim in respect of the said loss on the said hats, I find that no sufficient evidence has been laid before me by the plaintiffs to shew that, at the date of the said order of reference, they had, in fact, sustained any loss on the said hats. And upon that ground, and for want of sufficient evidence of such loss, I find that the plaintiffs are not entitled under the reference to recover anything in respect thereof." The award then proceeded to set forth the grounds upon which the finding of the arbitrator was founded, and having found that the defendant was entitled to succeed in the cause, he ordered the amount of the award upon the other claims to be paid by the defendant to the plaintiffs on the first of January, 1841, and directed that at the same time and place, the plaintiffs should pay to Messrs. Frisch, on account of the said defendant, the costs which, by the terms of the said order of reference, were to abide the event of the award. It was now contended, that the award was not final in respect of the claim for a loss sustained upon the varnished hats, and that unless that claim, which was an existing one, on the part of the plaintiffs during the reference was disposed of, the award could not be deemed to be good or sufficient. [*Tindal*, C. J.—The only way in which the finding is intelligible is, that it declares this was not a matter in difference at the time of the order of reference, and that the arbitrator, for the sake of safety, had stated this fact in order that when the claim does really arise, it may not be said, that it has been disposed of. The award will not be bad for such a

1841.
 COCKBURN
 and Another
 v.
 NEWTON.

reason]. But the question whether a loss had arisen, was one upon which the arbitrator was bound to decide, and it was his duty to say what sum, if any, was payable in respect of it. In *Petch v. Conlan* (a), to an action brought on the 27th of June, the defendant pleaded by way of set-off, a claim against the plaintiff, which was not payable till August 1, though the consideration had been received by the plaintiff before her action was commenced. Under a judge's order of July 27th, by the consent of both parties, all matters in difference, including the claim of the defendant in her set-off in the action, were referred to arbitration; and it was held, that the claim made in the set-off, was properly entertained by the arbitrator as a matter in difference, though not payable till after the date of the action and of the judge's order. The meaning of the words here used was, that a loss already existed, and if that was so, the arbitrator was bound to adjudicate upon it. It was not sufficient to say, that no valid claim had been proved, but a claim having been made, it ought to have been disposed of. *Re Tribe* and *Upperton* (b), *Ross v. Boards* (c). Secondly, the arbitrator had exceeded his power in making any order at all as to the day of payment of the costs of the cause, which, by the order of reference, were directed to abide the event of the award. The suit being determined, those costs followed as a matter of course, and the arbitrator was not authorized in confining the defendant to any particular day on which he might demand those costs. By the usual course, he might be entitled at an earlier period, and the Court would take care that he was not deprived of any of his rights incidental to the determination of the cause, by an excess of authority on the part of the arbitrator. *Seccombe v. Babb* (d). [*Erskine, J.*—In the case of *Harding v. Forshaw* (e), a cause and all matters in difference were re-

(a) 5 Bing. N. C. 442; 7 Scott, (d) 6 M. & W. 129; *Ante*, vol. 441; *Ante*, vol. 7, p. 486, S. C. 8, p. 167, S. C.

(b) 3 Ad. & Ell. 295.

(e) *Ante*, vol. 4, p. 761; 1 M.

(c) 8 Ad. & Ell. 290; 3 Nev. & P. 382. & W. 415, S. C.

ferred to an arbitrator, the costs to abide the event, as upon a trial at law, and final judgment might be entered up thereon by either party. The arbitrator awarded that the plaintiff had no cause of action, and ordered the defendant to pay a sum of money to the plaintiff, but (he added) it was not intended to prevent the plaintiff from recovering upon an agreement signed by the defendant, but that at present, he had no cause of action. The Court there held that the award was sufficient].

1841.
 COCKBURN
 and Another
 v.
 NEWTON.

The *Solicitor General*, in support of the rule. The award shewed that the arbitrator had been over cautious in pointing out those matters upon which he had, and those matters upon which he had not determined, and that he had excluded nothing from his consideration; and the fact of one part of the plaintiff's claim being left undecided, by reason of its not having arisen before the date of the order of reference, did not shew that the award was either invalid or uncertain. The finality of the award, however, was clear, because it found that the plaintiff was entitled to recover a certain sum and "no more," and where the Court saw no uncertainty, they would hesitate before they gave a party the benefit of such an objection. He was then stopped by the Court.

TINDAL, C. J.—I am of opinion, on the second objection taken in this case, to the manner in which the arbitrator has directed that the defendant shall recover his costs, that it is untenable, because the decision arrived at does not take away from the defendant the right which he has to recover his costs under the order of reference. I think that if he is entitled to recover them under that order at an earlier date than is pointed out, his right in this respect is not affected by the terms of the award. It appears to me, that the effect of the award is, that if the costs are not paid by the plaintiff on the day fixed for the settlement of the matters adjudicated upon, the plaintiff is prevented from

1841.
COCKBURN
and Another
v.
NEWTON.

taking out execution for a larger balance than he would be entitled to. As to the first objection; if there is any failing in the award, it has arisen entirely from the arbitrator's over caution, and from his desire to satisfy each party that his rights have been fully investigated. As to the hats spoken of, the arbitrator says, that the subject was not a matter in difference at the time of the reference. But what was submitted to his arbitration, were only those matters which were in difference at the time of the order of reference, and, therefore, the arbitrator proceeds to investigate what were matters in difference at that time. He says, that there was no evidence before him to shew that this was one of the subjects referred to him, and when he makes his adjudication, he says, that this was not a question referred to him at all; and then he goes on to adjudicate upon other matters. Looking, therefore, at the award, with an intention to understand, rather than to misunderstand its terms, it seems to me that there can be no doubt upon the case; and it certainly falls very closely within the decision in *Harding v. Forshaw*.

BOSANQUET, J.—I am of the same opinion. It is clear that the arbitrator, in this case, was not entitled to take into consideration any claim which was not a matter in difference at the time of this order of reference. In the award which the arbitrator has made, it is expressly pointed out, after the statement that he has taken all matters in difference into consideration, that there was no ground of claim for any loss in respect of these hats at the time of the reference, and he, therefore, states that as a reason why the claim in that respect is excluded. He has taken the whole matters in difference into consideration, and awards a balance to be paid to the plaintiff by the defendant; and then he says that he excludes this particular part of the claim from his allowance, because, at the time of the submission, there was no ground for it. I think, also, that the other objection with regard to the payment of costs, is without foundation,

because the costs are provided for by the order of reference itself, and the defendant loses nothing by the arbitrator awarding that the costs shall be paid before a certain time.

1841.

COCKBURN
and Anotherv.
NEWTON.

COLTMAN, J.—It appears to me, also, that this award can be supported. Looking at it, as it is presented to us, for it is to be observed that the Court can only form an opinion on the face of it, I think that the reasonable construction to be put upon it is abundantly clear. The arbitrator says, that the claim in respect of these hats did not exist at the time of the order of reference. He makes that statement by way of setting the matter in dispute further at rest, and shewing his reasons for the conclusion at which he has arrived. As to the question with regard to the costs, I think that the defendant is not deprived of any benefit by the restriction made as to the time of the payment, because it in no wise takes away his right to recover the costs in the usual way.

ERSKINE, J.—As far as the facts appear to the Court on the face of this award, it would seem that the plaintiff made a claim against the defendant for some loss, which he alleged he had sustained in respect of some varnished hats. How that arises, it does not appear. The effect of the award is, that in point of fact the plaintiff had sustained no loss in respect of these hats, up to the time of the submission to reference, and that the plaintiff, therefore, was entitled to recover nothing, and that is a final decision, with respect to the only matter in difference respecting these varnished hats, which was brought before the arbitrator. It is said, that as the arbitrator has gone on to state facts to shew the ground of his decision; that, as he says that no loss was sustained at the time of the reference, the award, therefore, ceases to be final. The case of *Harding v. Forshaw* shews, that where an arbitrator decided that up to the time of the reference, there was no cause of action, that was a final determination of all matters in difference. I think, therefore, that

1841.
 COCKBURN
 and Another
 v.
 NEWTON.

this award is sufficiently final and certain. As to the question upon the award as to the costs, I think that a sufficient answer has been already given.

Rule absolute (a).

(a) See *Ward v. Hall*, ante, p. 610.

FOWLER and Others v. RICKERBY and Others.

The plaintiff obtained a judgment in an action against a public officer, under the provisions of the 7 Geo. 4, c. 46; and subsequently sued out a writ of sci. fa., against fifteen persons, whom he charged as members of the corporation, of which the original defendant

was the representative public officer; the sheriff returned as to all the defendants that they had nothing, and were not to be found in his bailiwick; twelve of the defendants voluntarily appeared, and the plaintiffs declared against them: Upon demurrer, assigning for cause, that it did not appear that the then defendants who had not come forward, were included in the proceedings, it was held, that such an objection could only be an irregularity, and to be taken advantage of, on motion under the stat. 4 Anne, c. 16, and not upon demurrer; that the objection of non-joinder could not be raised upon demurrer, because there was nothing, on the face of the record, to shew that the three defendants, in question, were alive, and that the writ could not, therefore, be abated, on the ground of non-joinder; and, also, that as by the terms of the statute, 7 Geo. 4, c. 46, such persons as are sued, being members of the co-partnership, have their remedy for contribution against the other members of the same corporation, though not joined with them in the declaration in scire facias, a plea in abatement for non-joinder of those other members would be bad, and a demurrer to the declaration for the same cause, therefore, could not be sustained.

The plaintiffs declared, in scire facias, reciting a judgment recovered against one W. M., one of the public registered officers, for the time being, of the Imperial Bank of England, under the stat. 7 Geo. 4, c. 46, and prayed judgment against certain members of the co-partnership, carrying on the business of the Bank: Plea, that at the time of the recovery of the judgment against W. M., the said W. M. was not one of the public officers of the said corporation; conclusion to the country: Held, on demurrer, that the plea admitted that W. M. was sued as a public officer, and that in denying that he was such public officer at the time of the recovery, it introduced new matter upon the record, in respect of which, the plea should have concluded with a verification, and not to the country: Held also, that such a plea insufficiently stated a defence that W. M. had ceased to be the public officer of the Company, after the commencement of the original suit, and before judgment recovered.

Query, where a defendant sought to avail himself, in such a case, of a defence, that the judgment was obtained by fraud and collusion between the plaintiff and the public officer, how he should take advantage of that defence.

of the Imperial Bank of England, under, and by virtue, and according to the form and effect of an act of Parliament, passed in the 7th year of the reign of his late Majesty, King George the Fourth, for, amongst other things, the better regulating copartnerships of certain bankers in England, and which said William Marston had been duly nominated, and appointed, and registered, as such public officer, and was then sued for and on behalf of the said Company, according to the form and effect of the said act of Parliament, 580*l.* 14*s.*, for their damages, which they had sustained, as well on occasion of the not performing certain promises then lately made by the said Company to the said Sarah Fowler, &c., as for their costs and charges by them about their suit in that behalf expended, whereof the said William Marston was convicted, as by the records and proceedings thereof, then still remaining in the same Court manifestly appeared; and then, on behalf of the said Sarah Fowler, &c., in the same Court, our said Lady the Queen was informed, that although judgment was thereupon given, yet execution of the damages aforesaid still remained to be made to them. And our said Lady the Queen was also informed, on behalf of the said Sarah Fowler, &c., that Thomas Rickerby, John Johnson, James Wallworth, James Wallworth the younger, George Bradshaw, Robert Field, James Little, Joseph Allen, Henry Allen, John Bennett, Joseph Bennett, John Chettle, Robert Gough, Joseph Marler, and J. W. Kirkbride, at the time of the recovering and giving of the said judgment, were, and from thence had been, and still were members of the said co-partnership, wherefore the said Sarah Fowler, &c., had humbly besought our said Lady the Queen to provide them a proper remedy in that behalf; and our said Lady the Queen, being willing that what was just in that behalf should be done, commanded the said sheriffs, that by honest and lawful men of their bailiwick, they should make known to the said Thomas Rickerby, &c., that they should be before the said justices of our said Lady the Queen, at Westminster, on the 17th of June, 1840, to shew if they had or knew, or any or either of them had or

1841.

FOWLER
and Others

v.
RICKERBY
and Others.

1841.
 FOWLER
 and Others
 v.
 RICKERBY
 and Others.

knew, of anything to say for themselves or himself, why the said Sarah Fowler, &c., ought not to have execution against the said Thomas Rickerby, &c., of the damages aforesaid, according to the force, form, and effect of the said recovery, and of the statute in such case made and provided, if it should seem expedient for them so to do, and further to do and receive what our said justices did then and there consider of them in that behalf; and the said sheriff should have there the names of those by whom they should make known to them, and that writ, at which day come here the said Sarah Fowler, &c., by Thomas Hornby, their attorney, and offer themselves on the 4th day against the said Thomas Rickerby, &c., and the sheriffs, (to wit), William Evans and John Wheelton, sheriffs of London aforesaid, at that day returned, that the said Thomas Rickerby, &c., had not, nor had any of them anything in their bailiwick, whereby they could make known to them or any of them, as by the said writ they were commanded, nor were they, the said Thomas Rickerby, &c., or any of them found in the same. And the said Thomas Rickerby, &c., at that day being solemnly demanded, the said Thomas Rickerby, J. Johnson, J. Wallworth, J. Wallworth the younger, R. Field, John Bennett, and Joseph Bennet, by Edward Chester, their attorney, come; and the said J. Little, by N. C. Milne, his attorney, comes; and the said J. Allen, and H. Allen, by J. Lucas, their attorney, come; and the said J. Chittle, by William Fisher, his attorney, comes; and the said Joseph Marler, by T. H. Bower, his attorney, comes; and, thereupon, the said Sarah Fowler, &c., pray that execution against the said Thomas Rickerby, &c., (reciting the names of those twelve out of the fifteen defendants who had appeared), may be adjudged to them of the damages aforesaid, according to the force, form, and effect of the said recovery, and of the statute in such case made and provided.

Plea, by Thomas Rickerby, J. Johnson, J. Wallworth, J. Wallworth the younger, R. Field, John Bennett, and Joseph Bennett, that execution ought not to be adjudged to the said Sarah Fowler, &c., according to the force, form,

and effect of the said recovery, because they say, that at the time of the recovery, the said William Marston was not one of the public officers of the said persons united in co-partnership, in manner and form, &c., and of this they put themselves upon the country.

Demurrer: And the said Sarah Fowler, &c., as to the plea of the said defendants, say that the same is not sufficient in law, for the following causes: For that the present action in which the said plea is pleaded, being merely for the purpose of enabling the parties sued herein to shew cause why the said Sarah Fowler, &c., should not have execution on the said judgment obtained against the said William Marston as such public officer as aforesaid, the said Thomas Rickerby, &c., are precluded from pleading any matter in this action which might have been pleaded in the said action in which the said judgment was so recovered as aforesaid. And that it is, therefore, inadmissible for them to say that the said William Marston was not one of the public officers of the said co-partnership at the time of the said recovery, that fact being pleadable in the said original action of the said William Marston, as such public officer as aforesaid. Also, for that this action, in which the said plea is pleaded, being merely for the purpose aforesaid, the said defendants are precluded from pleading any matter which would have been admissible as a defence in the said action, in which the said judgment was so recovered as aforesaid, without showing and stating in the said plea some good and sufficient reason why, and on account of which, the said matter was not or could not be so pleaded in the said original action, &c. Also, for that the plea tends to raise an issue immaterial to the merits of the present action, in this, to wit, that the same admits and does not deny that the said William Marston was a public officer of the said co-partnership at the commencement of the said original action, and that being so, it is immaterial whether he continued to be such public officer at the time of the said recovery. Also, for that if it were material that the said

1841.

FOWLER
and Others
v.
RICKERBY
and Others.

1841.

FOWLER
and Othersv.
RICKERBY
and Others.

William Marston should continue to be such public officer at the time of the said recovery, the facts why and by reason of which it was so material, should have been stated and shewn to the Court in the said plea. Also, for that the said plea traverses, and attempts to put in issue a fact not alleged in the said declaration, to wit, whether the said William Marston was a public officer of the said co-partnership, at the time of the said recovery, it being in no part of the said declaration alleged or averred that the said William Marston was such public officer, &c., but the said declaration merely recites the writ of scire facias in this action, in which that fact is stated and alleged. Also, for that the said plea attempts to refer the question, whether the said William Marston was such public officer, &c., to the decision of a jury, whereas such a question should not be left to a jury. And the said plea should not have concluded to the country, but to the record, or with a verification. Also, for that the said plea is neither in denial, nor in confession and avoidance. Also, for that the said plea affords no answer whatsoever to the said declaration, and is, in other respects, uncertain, insufficient and informal.

Joinder in demurrer.

The defendant Little pleaded a similar plea, to which the plaintiffs demurred in like manner. The defendant, Joseph Marler, demurred to the plaintiffs declaration, and stated the following causes:—That, although it appears by the said declaration, that the said writ in this behalf was issued at the suit of the said plaintiffs against the said George Bradshaw, Robert Gough, and J. W. Kirkbride, together with the said defendants, Joseph Marler, Thomas Rickerby, &c., yet it doth not appear by the said declaration, that the said George Bradshaw, Robert Gough, and J. W. Kirkbride are, or that any of them are included therein, or that any further proceedings have been taken against them or any of them; nor doth it appear by the said declaration, that the said G. Bradshaw, &c., or any of them, were or was liable to be sued in this behalf, or that the

said defendant, Joseph Marler, was or is liable to be sued in this behalf, jointly with the said G. Bradshaw, &c., or why the said last mentioned persons were inserted in the said writ, or why they or any of them were or are omitted from the said declaration, and also that the said declaration is in other respects informal and insufficient.

Joinder in demurrer.

Channell, Serjt., was called upon by the Court, first, to support the demurrer to the declaration. The question raised upon the demurrer was, whether the plaintiffs having sued out a writ of scire facias against fifteen defendants, twelve of whom only had appeared, ought not to have declared against those three defendants who had not appeared, as well as those who had appeared, or whether they ought not to have signed judgment against those three defendants. There was no doubt that where proceedings were taken by scire facias against two, and one only appeared, and the subsequent proceedings were against that one only who did appear, the proceedings were irregular, and would be set aside on that ground, *Sainsbury v. Pringle* (a), the only question was, whether the same objection would arise upon demurrer. Such an objection would be good ground for a plea in abatement, and that being so, the Court would not drive the defendant to such a plea, where the objection appeared on the face of the plaintiffs' proceedings. That a scire facias was a proceeding in which a plea in abatement might be pleaded, appeared clear from the authorities. (b) The parties sued, besides having a right of contribution from the other defendants, were entitled to plead their non-joinder. [*Tindal*, C. J.—In *Holland v. Lee* (c) it is laid down that where a man recovers damages against two, and sues out a scire facias against them, and it is returned that the sheriff has summoned them, and one of them has nothing in his bailiwick, the plaintiff may have execution

1841.

FOWLER
and Others
v.
RICKERBY
and Others.

(a) 10 B. & C. 751.

(c) 1 Roll. Rep. 57.

(b) 2 Wms. Saund. 72.

1841.

FOWLER
and Others

RICKERTY
and Others.

against the other for the whole]. That authority was directly in opposition to the decision in *Sainsbury v. Pringle*. [*Tindal*, C. J.—*Sainsbury v. Pringle* was the case of a motion to the Court, and by the stat. 4 Anne, c. 16, the Court is empowered to give relief upon motion]. But the irregularity must have been made out to entitle the party applying to relief. The plaintiffs at all events were bound to make their proceedings regular, and they should have signed judgment against those defendants who did not appear.

Stephen, Serjt., in support of the declaration. There was no irregularity shewn to exist upon the face of the declaration, but if there was, it was no ground of demurrer. This case differed from *Sainsbury v. Pringle*, because the form of scire facias was dissimilar. The writ here called upon the sheriff, not merely to make known to the defendants that they should be before the justices to shew cause against the judgment, but “to shew if they had or knew, or any or either of them had or knew of any thing to say for themselves or himself,” why the plaintiffs should not have execution against them. In *Cabell v. Vaughan*, (a) the general doctrine was entered into, and it was laid down that the mere non-joinder of parties, as a general rule, afforded no sufficient ground of demurrer, for the materials of a demurrer did not fully appear upon such a state of facts. It was true that non-joinder might in scire facias form the ground of objection, but that objection should be raised by a plea in abatement, and not by demurrer. *Jefferson v. Morton*. (b) [*Tindal*, C. J. The objection is, in fact, an objection of variance between the writ and the declaration, which is an objection to be taken on motion, rather than by demurrer.] *Thompson v. Dicus* (c) was to that effect. *Panton v. Hall* (d) rather went to prove that the omission of parties would be no ground of demurrer.

(a) 1 Saund. 291, a. n. 2.

(c) 3 Tyr. 873.

(b) 2 Saund. 8 d. 9 a. n. 10.

(d) 2 Salk. 598.

Mere irregularity afforded no ground of demurrer, but amounted at most to a breach of the rules of the practice of the Court. *Donnelly v. Dunn* (a), *Sandon v. Proctor* (b), *Knight v. Parker* (c). But this case, after all, could not be considered as standing upon ordinary grounds, but the decision to be arrived at must materially depend upon the result of the construction to be put upon the stat. 7 Geo. 4, c. 46. The object of that statute was to give the public a proper security against joint stock companies, by rendering the members of such co-partnerships personally liable for the securities given under the general authority of the company. The Courts concurred in the view, that the proper mode of proceeding in a case like this was by *scire facias*. *Whittenbury v. Law* (d), *Cross v. Law* (e), *Bosanquet v. Ransford* (f). The 9th section of the act, directed that all actions or suits, to be commenced or instituted for or on behalf of any co-partnership formed under the provisions of the act, against any person or persons, for recovering any debts or enforcing any claims or demands due to such co-partnership, &c. shall and lawfully may from and after the passing of this act, be commenced and instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid, for the time being of such co-partnership as the nominal plaintiff; and that all actions or suits, &c. to be commenced or instituted by any person or persons against such co-partnership, shall and may be lawfully commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such co-partnership, as the nominal defendant for and on behalf of such co-partnership. Section 12, enacted "that judgments obtained against such public officers should operate against the co-partnership," and section 13, provided, "that execution upon any judgment in any action

1841.

FOWLER
and Others
v.
RICKERBY
and Others.

(a) 2 B. & P. 45.

(b) 7 B. & C. 800.

(c) 2 W. Bl. 759.

(d) 6 Bing. N. C. 345.

(e) *Ante*, vol. 8, p. 789, S. C.

6 M. & W. 217.

(f) 3 P. & D. 298.

1841.

FOWLER
and Othersv.
RICKERBY
and Others.

obtained against any public officer for the time being of any such corporation or co-partnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of any such corporation, &c. ; and that in case any such execution against any member or members for the time being of any such corporation, &c. shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons, who was or were a member or members of such corporation, &c. at the time when the contract or contracts, or engagement or engagements, on which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained." Section 14, enacted, " that every such public officer, in whose name any such suit or action shall have been commenced, prosecuted, or defended, and every person or persons against whom execution upon any judgment obtained or entered up as aforesaid in any such action shall be issued as aforesaid, shall always be reimbursed and fully indemnified for all loss, damage, costs, and charges, without deduction, which any such public officer or person may have incurred by reason of such execution, out of the funds of such co-partnership, or in failure thereof, by contribution from the other members of such co-partnership, as in the ordinary cases of co-partnership." It was obvious, from these provisions, paying a due regard to the object of the legislature, that it was intended that the public should have recourse to any one of the members of such a co-partnership as this, for the purpose of securing the payment of any demands which might be had upon the corporation generally. The party plaintiff need not proceed against all the members of the co-partnership, nor was it intended that he should be confined in his

proceedings against only one, but he might proceed against such members of the body as he might deem competent to answer his claims. The 14th section put all doubt upon this point entirely at rest, by its provisions, that any party who was sued should be reimbursed by the other members of the co-partnership; and where the Court saw the intentions of the legislature so obviously expressed, it would not give way to any objection of non-joinder, of any of the parties liable. The only ground upon which a plea in abatement of non-joinder was permitted to be placed upon the record, was that in a case where there were several defendants equally liable, each had a right to contribution from the rest; (a) but that was a reason which did not apply to this case, because the claim to contribution was expressly provided for by the terms of the act of Parliament. (b)

1841.

FOWLER
and Othersv.
RICKERBY
and Others

Channell, Serjt., in reply. If there was an irregularity upon the face of the record, it was going a long way to say that it would not afford ground of demurrer. The cases which had been cited, did not apply to that which was now before the Court. In *Jefferson v. Moreton*, the objection did not appear on the face of the record, but was raised by a plea in abatement. The only question here really was, whether the defendant was absolved from the necessity of such a plea? The object of a scire facias was to give an opportunity to all persons who were liable, to shew why they should not pay the amount sought to be recovered, and he admitted that he must contend, that whatever number there might be, the omission of any one would entitle the remainder to plead that omission in abatement. The right to such a plea was not got rid of by the provisions of this act.

TINDAL, C. J.—In this case, the plaintiff has sued out a scire facias against fifteen persons, whom he alleges at the time of his recovering and the giving a judgment against a

(a) 2 Saund. 9, a. n. 10. (b) See *Palmer v. Beale*, *Ante*, p. 530.

1841.
FOWLER
and Others
v.
RICKERBY
and Others.

public officer, were, and from thence hitherto have been, and still are members of a corporation represented by that public officer, and against whom, therefore, he prays judgment. The sheriff makes a similar return as to all of the defendants, and says that they have nothing at all in his bailiwick, nor are they to be found in his bailiwick. Twelve of the persons included in the scire facias come in voluntarily and plead, some of them together, and some separately, leaving three unaccounted for. The answer of one of those who voluntarily appears, is a demurrer to the legality of the proceedings, on the ground that the original scire facias was against fifteen persons, and that the declaration is against twelve only of them. The question is, whether that is a cause of demurrer? That a variance between the process and the declaration is matter of irregularity, and may be taken advantage of by applying to the Court, is perfectly clear from the case of *Sainsbury v. Pringle*. That case shews that where a scire facias was issued against two defendants, and the proceedings were against one only, they were irregular and must be set aside. First, however, the very circumstance of this being an irregularity, strongly militates against the proposition, that it is an objection to the record which can be taken by demurrer; and I think that generally in such cases, if you mean to except that the party has included more in the writ than in the declaration, you must apply to the Court, and not put your objection on the record as an answer to it. By putting it on the record as an answer to it, you must say that it amounts to an abatement of the writ. But it appears to me, that that is a wrong conclusion. In order to constitute a good plea in abatement in such a case, it must appear that the party of whose non-joinder you complain, is alive at the time the defendants plead, because the plea professes to give the plaintiff a better writ. Now looking at this record, all that this scire facias says is, that on the day on which the scire facias issued, the plaintiff undertook to shew that the several persons included in the writ were members of the corpora-

tion. Non constat, however, that at the time at which the sheriff makes his return, these three persons as to whom the record is silent, were still living, or consequently that the plaintiff had any authority or power to proceed against them. I think, therefore, that on the facts stated on the record, there is not a sufficient allegation to shew that the writ should have been abated. But on another ground, looking at this statute, I think that a plea in abatement was never contemplated. What is the object of the statute? It gives an authority to those who hold the notes of these banking firms, to bring an action against the public officer of the company alone, and having recovered judgment to issue execution "against any member for the time being of such corporation or co-partnership;" giving a much wider range, therefore, than that which is ordinarily given, where you issue execution against those parties who are parties at the time the contract is entered into, no authority being generally given against those who enter into the partnership after the contract is made, which is the subject matter of the action. But where you find in the very next section (s. 14), that the public officer in whose name the suit was prosecuted, and every person against whom execution upon any judgment obtained, shall be issued, "shall always be reimbursed and fully indemnified for all loss, damages, costs, and charges, without any deduction, which such public officer or person may have incurred by reason of such execution, out of the funds of such corporation, or in failure thereof, by contribution from the other members of such co-partnership," that shews that there is a full remedy given to these persons without the others being brought in by a plea in abatement. The object of this act is allow the judgment creditor, when he has obtained judgment, to go singly against any one who is responsible, and who is a member of the corporation at the time, and he cannot be compelled, when he has brought one party before the Court by scire facias, to proceed against all the others. That is, in effect, the plea in abatement

1841.

FOWLER
and Others

v.
RICKERBY
and Others.

1841.

FOWLER
and Othersv.
RICKERBY
and Others.

being taken away in the original action, it is also virtually taken away on the scire facias.

BOSANQUET, J.—The objection raised upon this demurrer is, that the plaintiff is proceeding upon a scire facias in which the names of fifteen persons are mentioned, but that his declaration is against twelve only of those fifteen individuals. I think that that which is the ground of this demurrer may be matter of irregularity, but that which is matter of irregularity is not therefore the subject of demurrer, but on the contrary, the presumption is that it is not so, and the Court will not allow that which is matter of irregularity only to be pleaded. But then it is said, that if the objection appears on the record, it is ground of demurrer. But it does not appear that the three persons who are not declared against, were alive when the plea was pleaded, and if they were not alive, the defendant cannot, by a plea in abatement, give a new writ. But I further agree with my Lord, that it were never contemplated, that persons proceeded against under this act should have an opportunity of pleading in abatement; and I do not think that a scire facias, being issued in pursuance of its terms, it was the intention of the statute that a plea in abatement should be put upon the record. The object of the act was, that when a judgment was obtained against a public officer, the plaintiff should have an opportunity of proceeding against one or more of the persons who should be liable, but not that those persons who were proceeded against should have an opportunity of saying that all the members of the corporation were not joined, which my brother *Channell* admits must be the consequence of his argument. The 14th section of the act is, I think, decisive upon the point, for it provides that the parties sued shall be reimbursed from the funds of the company, or by contribution, whatever sums they expend in consequence of the proceedings taken against them.

COLTMAN, J.—It is clear in this case, by the admission of my brother *Channell*, that unless he could support a plea in abatement to the declaration, he cannot succeed in this demurrer. But it must be stated in a plea in abatement, that the contract was made with others, who are still alive and resident within the jurisdiction of the Court, and there is nothing on the record in this case, to shew that the parties were alive at the time of the return of the sheriff, and of the declaration. As to the other point, it is not necessary to say much ; but I would observe, that the defendants stand here in a very different situation from parties to a recognizance of bail, for instance. There are there three persons, entering into a joint and several contract, for the performance of certain stipulations ; but you may sue them either on a joint contract as against them all, or you may proceed against each separately. But the 13th section of this act authorises the plaintiff to take out execution against one or more members of the co-partnership, which shews the intention of the legislature to be, that you should not be bound to treat it either as a joint contract, as against all, or as a separate contract against each.

ERSKINE, J.—I am of the same opinion. The argument which is raised on the part of the defendant in this case, is answered upon two grounds ; first, there is nothing on the record to shew that the parties, whose non-joinder in the declaration is complained of, were alive, and resident within the jurisdiction of the Court, at the time of the plea being pleaded, which is necessary : and, secondly, that it was not the intention of the legislature that parties, in the position of this defendant, should plead in abatement under the circumstances of this case. Upon the latter point, it appears to me, that an action is given against the public officer of the company to relieve the plaintiff from the necessity of joining all the members of the co-partnership on the record ; and, although, under the 13th section, it is necessary to

1841.

FOWLER
and Others
v.
RICKERBY
and Others.

1841.
 FOWLER
 and Others
 v.
 RICKERBY
 and Others.

have a scire facias, to bring on the record the names of those members of the company, whom the plaintiff may select as the objects of his execution, yet it never could have been intended that all those evils should be produced in this stage of the proceedings, which it was the object and intention of the legislature to avoid. The act of Parliament says, that execution may be issued against any member for the time being of such company, or against any person who is, or has been, a member of the corporation. The object, therefore, was to give the plaintiff the opportunity of selecting one, two, three, or any number of the members of the company to proceed against.

Judgment for the plaintiff.

Stephen, Serjt., in support of the demurrers to the plea, put in by the defendants, Thomas Fowler and others, and James Little. First, the conclusion to the country was bad, because it was not alleged in the declaration that Wm. Masters was a public officer at the time of the recovery of the judgment, the fact of his being a public officer being merely recited in the writ, and because, therefore, no issue could be raised upon that fact, of which the country could be called upon to inquire. Secondly, the defendant could not plead any matter in bar of a scire facias, on a judgment, which might have been pleaded in the original action, *Underhill v. Devereux* (a), *Allens v. Andrews* (b); and this rule applied to every case of proceedings on a judgment, where the matter sought to be pleaded to invalidate the judgment might have been pleaded in the original suits *Com. Dig.* tit. "*Pleader*," (L 3) 13. In *Baylis v. Hayward* (c), to scire facias upon a judgment in assumpsit, by the plaintiff, the defendant pleaded the plaintiff's bankruptcy, assignment, &c.; and that the causes of action in

(a) 2 Wms. Saund. 72, t. (n. 4.)

(c) 4 Ad. & Ell. 256.

(b) Cro. Eliz. 283.

the original suit, accrued before the plaintiff became bankrupt. On special demurrer, for that the plea did not shew, whether the judgment was recovered before or after the bankruptcy; it was held, that the plea was bad, inasmuch as it did not appear but that the bankruptcy might have been pleaded in bar of the original action. In the present case, the plea might be strictly true, and the defendant, in the original action, might have had abundant opportunity of setting up the same defence.

1841.
 FOWLER
 and Others
 v.
 RICKERBY
 and Others.

Channell, Serjt., in support of the pleas. He admitted that a defendant, who was a party to the original action, as well as to the scire facias, could not, in pleading to the latter, set up any answer, which he might have pleaded to the original suit; but in order that that rule should prevail, it was necessary that the same person should be defendant in both proceedings. He admitted also that where a defendant was sued upon a scire facias as executor, heir, or tenant, he could not set up any matter which would go to shew that the individual, of whom he was the representative, was not liable to the judgment obtained. But a broad distinction existed between these cases, and that which was now before the Court, without which, the most mischievous consequences would arise. It might be that the original judgment had been obtained by collusion between the plaintiff and the public officer; or the public officer might have been discharged by the company, and have suffered judgment by default; and surely, in either of these cases, the defendants, sued upon such judgments, might dispute the fact of the person originally sued being the public officer of the company. [*Tindal*, C. J.—The name of the public officer is required to be registered by the act of Parliament, and it is the fault of the company if that register is not properly kept. If it were a collusive judgment, is not that ground of application to the Court?] Then, admitting the person originally sued to have been

1841.
 FOWLER
 and Others
 v.
 RICKERBY
 and Others.

once the public officer of the company, that did not prove him to have been the public officer at the time of judgment recovered. The recovery, under a provision of the statute, must be against the public officer "for the time being," (ss. 12 and 13) *Harwood v. Law* (a). The plea in this case denied, that he was the public officer of the company "at the time of the recovery." That was an issue properly taken upon the declaration; the affirmative of which, if true, might be easily proved by the plaintiff; while the hardship upon the defendants, of such a defence not being permitted to be set up, was very great. Then the plea was rightly concluded to the country. The declaration must be supposed to contain an implied allegation, that Masters was the public officer at the time of the judgment. In the case of the *Edinburgh and Leith Railway Company v. Hebblewhite* (b), it appeared, that by the act 6 & 7 W. 4, c. 121, s. 50, it is provided, that in actions by the company for calls, it shall be sufficient to allege, that the defendant, being a proprietor of shares, is indebted to the company in a certain sum of money upon such shares belonging to him, whereby a right of action hath accrued to the said company, without setting out the special matter; and in such action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls; that they were made; and that notice thereof was given according to the act. To a declaration, in the general form given by this clause, the defendant pleaded pleas, denying notice of the calls pursuant to the act, and concluding with a verification. It was held, that the allegation of notice, that fact being necessary to be proved, in order to entitle the plaintiff to recover, must be taken to be impliedly contained in the declaration, by reference to the act; and that the pleas, therefore, being in denial of a matter, necessarily implied in the declaration, ought to have concluded to the country,

(a) 7 M. & W. 203.

(b) *Ante*, vol. 8, p. 802, S. C.; 6 M. & W. 707.

and not with a verification, and were, on that ground, bad on special demurrer. [*Tindal*, C. J.—I am far from saying, that if there was such a collusion or fraud, as you suggest, a plea might not have been framed, alleging that the judgment was obtained by such fraud.] Such a plea would only amount to a denial that the person originally sued was, at the time of the judgment, the public officer of the company, which was the allegation here. [*Tindal*, C. J.—But by such a plea you would have afforded an opportunity to the plaintiffs to answer your allegation.]

1841.
 FOWLER
 and Others
 v.
 RICKERBY
 and Others.

Stephen, Serjt., in reply. The case was unlike that of the *Edinburgh and Leith Railway Company v. Hebblewhite*, because here, there was no allegation, either express or implied, in the declaration, upon which the plea took issue. The declaration merely recited the writ, in which the recovery against Masters was set out, and then prayed execution against the defendants. It opened no question of fact in reference to the position of Masters, and the plea denied that which was not alleged, and was bad as concluding to the country. But looking at the plea itself, it was substantially insufficient, for it admitted that the defendants were members of the company, and that, at the time of the original action being brought, Masters was the public officer of the company. That he had been a public officer of the company since the commencement of the suit was, therefore, clear, and through his means, the company must have received notice of the proceedings. It would be doubly hard upon the plaintiffs, who had commenced these proceedings correctly, if, by any act of the defendants, they could be deprived of the benefit of those steps which they had taken. The plea was otherwise insufficient to raise an issue that Masters had ceased to be the public officer, and if it did raise such an issue, it was improperly concluded to country; for, if it contained any new matter, the right conclusion would have been a verification.

1841.
FOWLER
and Others
v.
RICKERBY
and Others.

TINDAL, C. J.—It appears to me that without entering into the question whether this might or might not have been made a good plea, it is, at all events, clear that the plea upon this record is bad. The declaration begins by reciting, that a judgment was recovered against William Masters, one of the public officers for the time being, of this corporation, without making any allegation of the fact, that he was one of the public officers at the time the judgment was recovered. The plea contains an allegation, that at the time of the recovery of the judgment, William Masters was not one of the public officers of the company, and concludes to the country. That, therefore, is a direct denial, and conclusion to the country of that which is not stated expressly, or by implication, in the declaration itself. Then there is a direct and distinct allegation, that William Masters was duly appointed and registered such public officer, and was sued for and on behalf of the company, and that is not denied. So the plea admits that William Masters was duly appointed the public officer of the company, and was sued in that capacity. That being admitted on the part of the defendant, unless he can shew in this plea, by some new allegation, that the original character of Masters has ceased, we must assume that it has continued; and if he means by this plea that it has ceased, he is setting up a new matter, not contained in the declaration itself, and if he does so, he should conclude with a verification, and allow the other party to answer it. Therefore, as in this plea, the defendant endeavours to avail himself of a ground of defence which is new matter; the plea is bad, in concluding to the country, and not with a verification.

BOSANQUET, J.—I am also of opinion that this plea is bad, on the ground that it sets up some new matter, and concludes improperly to the country, instead of with a verification.

COLTMAN, J.—I also think this is a bad plea. The plea alleges, merely, that at the time of the judgment recovered, William Masters was not a public officer of the company, which is, by implication, an admission that he was a public officer at a previous time. If the defendant meant to allege more than I have pointed out, he should have stated it. Therefore, it seems to me, that he has not alleged sufficient to prevent his being responsible for the admission by the public officer.

ERSKINE, J.—Concurred.

1841.

FOWLER
and Others

v.

RICKERBY
and Others.

COURT OF EXCHEQUER.

Easter Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1841.

JONES v. WILLIAMS and Others.

To trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that an action was brought by him against the plaintiff which was referred to arbitration, and that the arbitrator awarded a certain sum to be due to the defendant, and ordered the plaintiff to pay it on a certain day, which the plaintiff having refused to do, the de-

fendant issued a writ of *fi. fa.*, and levied on the plaintiff's goods. Replication, that by a rule of Court, the said writ was ordered to be set aside for irregularity: Rejoinder, by way of estoppel, that after the making of the rule of Court, the plaintiff ruled the sheriff to return the writ: *Held*, upon special demurrer to the rejoinder, that the replication was good, and that it was unnecessary to aver that the rule of Court was acted on.

Secondly, that the act of ruling the sheriff to return the writ, did not estop the plaintiff from shewing that the writ was not a good writ; neither did the filing of record affirm the existence of a void writ.

Thirdly, that the 1 & 2 Vict. c. 110, s. 18, does not authorize a party to issue execution for money ordered to be paid by an award.

Held also, that though the statute does not authorize execution unless the amount appears by the order, yet execution may issue for costs when ascertained by the officer, and that it is not necessary there should be an order after the officer has taxed.

and inclusive of the day of the date of that agreement, including the costs and charges of witnesses, who had been subpoenaed by either party, to attend the trial of the said cause, and the costs of their travelling home; and the costs of preparing the said agreement and the said award, and of carrying the same respectively into effect; and the costs and charges of the said arbitrator; and the costs and charges attendant on or incurred in the said reference by the said parties, their advocates, and witnesses, should abide the event of the said reference, and of the said award, and to be taxed as between attorney and client, and to be paid by such party against whom a balance of the accounts should appear to be due by the award, at such time, and in such manner, as the said R. G. T. by his award should direct. And it was agreed that the arbitrator should be at liberty to examine, ascertain, and settle the accounts as claimed in the particulars of the plaintiff's demand, and the defendant's, J. W's., set-off in the said action; and the arbitrator was to be at liberty to direct the payment of any balance which he might find to be due upon those particulars, either from the plaintiff to the defendant, J. W., or from the defendant, J. W., to the plaintiff, at such time and in such manner as the said arbitrator should think fit, as by the said agreement, reference being thereunto had, will fully appear. The plea then stated, that the arbitrator awarded that there was a balance due upon the accounts from the plaintiff to the defendant, J. W., amounting to 69*l*. 8*s*. 11*d*., which sum, together with the costs, charges, and expenses, the arbitrator directed to be paid by the plaintiff to the defendant, J. W., on the 1st of September then next, and then alleged that the agreement was made a rule of Court; that after the making of the award, and before the time when, &c., the costs, charges, and expenses, so made by the said agreement to abide the event of the said award, were duly taxed, as between attorney and client, at a large sum of money, to wit, the sum of 239*l*., whereof the plaintiff afterwards had notice, and was then requested

1841.

JONES

v.

WILLIAMS
and Others.

1841.
JONES
v.
WILLIAMS
and Others.

by the defendant, J. Williams, to pay him the said sum of 69*l*. 8*s*. 11*d*., together with the costs, charges, and expenses so taxed as aforesaid, amounting in the whole to the sum of 308. 8*s*. 11*d*., according to the tenor and effect of the said rule of Court, and of the said award and submission, but the plaintiff wholly neglected and refused to pay the same, or any part thereof; that afterwards, and before the said times, when, &c., the said rule of Court being in full force and effect, and the said last mentioned moneys unpaid and unsatisfied, the defendant, J. Williams, for the obtaining satisfaction of the said monies in his own right, and the other defendants, as the attornies of the defendant, J. W., and by his commands, sued and prosecuted out of the Court of Queen's Bench a certain writ of our Lady the Queen called a writ of testatum fieri facias (setting out the writ), which said writ so indorsed, afterwards and before the execution thereof, was delivered by the defendants to one D. H., who, then and from thence until at and after the execution of the said writ, was sheriff of the said county of Montgomery, to be executed in due form of law, by virtue of which said writ, the said D. H. broke and entered the said premises for the purpose of levying the said moneys so directed to be made by the said writ as aforesaid, which are the same trespasses, &c. Verification.

Replication. That after the suing and prosecuting out of the said Court of the said writ of fieri facias, by a rule of the said Court, then duly made and entitled in the said cause, and also entitled, &c., it was ordered by the said Court, that the said writ of fieri facias and all subsequent proceedings, should be set aside for irregularity, with costs, and it was referred to one of the Masters to tax such costs, which costs, when taxed, should be paid by the defendant to the plaintiff, or his attorney, as by the said last mentioned rule of the Court of our Lady, the Queen, before the Queen herself, reference being thereunto had, will fully appear. Verification.

Rejoinder. And the defendants say, that the plaintiff

ought not to be admitted or received to plead the said replication, because they say, that after the making of the said supposed rule of Court, in the said replication mentioned, and whilst the said writ of fieri facias in the said last plea mentioned, was in the hands of the said sheriff of Montgomeryshire, and before any return to the said writ had been made by the said sheriff, to wit, on &c., the now plaintiff applied for, and caused to be issued, a certain order of the Right Honourable Sir J. B. *Bosanquet*, Knight, one of the Justices of her Majesty's Court of the Bench, at Westminster, duly made and entitled in the said cause in the said last plea mentioned, and bearing date, &c., whereby it was ordered that the said sheriff within eight days next after service of that order upon him or his deputy, should peremptorily return the said writ of fieri facias in the said last plea mentioned, which said order the now plaintiff, afterwards, to wit, on, &c., caused to be served on one W. D., then being the deputy of the said sheriff, that after the said order had been so served as aforesaid, and within eight days then next ensuing, to wit, on, &c., the said sheriff, in obedience to the said order, in due manner, returned the said writ, as by the said writ and return thereof, remaining of record in the said Court of our said Lady the Queen, before the Queen herself, fully appears. Verification.

Special demurrer, assigning for causes, that the rejoinder contains no answer to the replication, inasmuch as it does not deny that the writ under which the defendants justify, had been set aside by the Court from which it issued for irregularity, after which the application by the present plaintiff for the judge's order to the sheriff to return it (in order to secure its safe custody), did not affirm or admit its validity, or its efficiency as a protection to the parties issuing it.

Tomlinson, in support of the demurrer. The rejoinder affords no answer to the replication. If there was any motive to justify the plaintiff in having the writ secured, the

1841.

JONES

v.

WILLIAMS
and Others.

1841.
 {
 JONES
 v.
 WILLIAMS
 and Others.

act of ruling the sheriff to return it would not operate as an estoppel. Many reasons might be suggested for having the writ returned as if the sheriff had been guilty of excess in the mode of executing it, it would be necessary for the party to have it returned, in order to found on it an application to the Court, or to proceed by action on the statute. An estoppel is when a man is concluded by his own act or acceptance, to say the truth, *Com. Dig.* tit. "*Estoppel*" (A). Here, all that the plaintiff admits is, that there is, in truth, such a writ, which, unless it be void upon the face of it, would protect the sheriff, although the parties who issued it might be trespassers. In justifying under a *fieri facias*, the sheriff pleads the writ only, whilst the party must shew the judgment or other authority for issuing it; an estoppel ought to be certain to every intent. Then the plea is bad, as it shews no authority for issuing the execution. The point has already been decided in the Court of Queen's Bench, in the case of *Jones v. Williams* (a).

The Court then called upon

Cresswell, contra. The replication does not sufficiently shew that the writ was set aside, it is only stated that an order for that purpose was pronounced by the Court; but it is not averred that the order was drawn up or acted upon, and for anything that appears, the party may have abandoned it. Then the rejoinder shews that after the order was obtained, the plaintiff ruled the sheriff to return the writ. If the rule for setting aside the writ had been drawn up and acted upon, there would have been an end of the writ altogether. A writ set aside is the same as if it never existed. The rejoinder not only shews that the writ exists, but avers that it is filed of record. If the plaintiff wished to deny that fact, he might have issue joined *nul tiel record*. The filing of record estops him from denying the existence of the writ. It is argued, that the plaintiff might

(a) 11 Adol. & E. 175.

have several motives for wishing the writ returned, but in that case, he should have applied to the Court to impound it. With respect to the plea, it is submitted, that the 1 & 2 Vict. c. 110, justifies an execution in cases like the present, and that the case of *Jones v. Williams* was not well considered. There, the Court says, "It is undoubtedly money payable by something arising out of and connected with the rule, but then can the award be engrafted on the rule so as to make the money payable by the rule? The difficulty that presents itself is, that there is no definite sum of money expressed to be payable by the rule itself." But the 18th section does not use the words, "whereby any sum of money shall be ordered to be paid, but whereby any sum of money shall be payable." A party is pronounced in contempt for disobeying the rule of Court, not for non-performing the award. The enforcing an award by attachment, is treating the money as payable by the rule. [*Rolfe*, B.—The 19th section uses the words "moneys thereby recovered, or ordered to be paid"]. One difficulty suggested by the Court in *Jones v. Williams* is, that "as the rules are to have the effect of judgments which are to charge the land, the sum to be so charged, ought to be distinctly stated in the document which thus charges the land, so that purchasers or creditors may know what it is;" but the 19th section contemplates the existence of an order which does not ascertain the amount of the money to be paid. [*Parke*, B.—That section contemplates that every thing shall be payable by the rule. *Alderson*, B.—In the case of a submission to arbitration, there is no sum of money payable by the rule of Court; the sum payable cannot be ascertained, unless by reference to the award, and the award is no part of the rule]. According to the practice of Courts of Equity, the amount of costs never appears upon the decree of the Court.

1841.
 JONES
 v.
 WILLIAMS
 and Others.

Tomlinson, in reply. There is no mode by which the plaintiff could have obtained the writ, except by ruling the

1841.
JONES
v.
WILLIAMS
and Others.

sheriff to return it. The fact of its existing on the files of the Court does not make it a record, but it is simply preserved there to afford a protection to the sheriff. The same difficulty would have arisen if the defendant Williams had caused the return of the writ. With respect to the replication, it must be presumed that the rule setting aside the writ is in force, unless the contrary be shewn. The analogies referred to in support of the plea were against the defendant. In the case of an attachment, the contempt was not in the non-payment of money, but in the non-performance of the agreement to abide by the award. The legislature never intended the statute to apply to a case like the present; and if it were so held, a party would be protected from a trespass in levying on the goods of another, though the award might be void on the face of it. It is clear that a distinction was intended to be made between money and costs, payable by the order; and the forms of writs, settled by the judges, adopt that distinction. The writ follows the form No. 8, but misrecites the authority, for there is no money payable by the rule of Court. When the statute speaks of a judgment, it means final judgments, but this proceeding is in the nature of an interlocutory judgment. To put the construction contended for on the statute, would be to repeal the 9 & 10 Wm. 3, c. 15, s. 2, which allows a party a whole term to apply to set aside an award; and even if the one party should neglect during that time to take any step, the other cannot enforce the award without an opportunity being afforded of shewing any defect in it.

PARKE, B.—This is an action of trespass for breaking and entering the plaintiff's dwelling house, and seizing his goods and chattels. The defendants justify under a writ of fieri facias. It appears, by the plea, that an action was commenced by the plaintiff against the defendant Williams, and that, by agreement in writing, the action, and all matters in difference in the cause, were referred to a gentle-

man at the bar, who was to take an account between the parties, and all costs were to be paid by the party against whom a balance of account should appear by the award to be due: the plea then alleges that the arbitrator proceeded with the reference, and finally awarded that there was a balance due upon the accounts referred to him from the plaintiff to the defendant Williams of 69*l.* 8*s.* 11*d.*, which sum, together with the costs, charges, and expenses so made to abide the event of the award, the arbitrator directed to be, paid by the plaintiff to the defendant Williams on a certain day. It is then alleged, that the agreement was made a rule of Court, and that the costs were taxed at the sum of 239*l.* 8*s.* 11*d.*; and without shewing any further application to the Court, the plea states that the defendant Williams, in his own right, and the other defendants as his attorneys, issued a testatum fieri facias, commanding the sheriff to levy that sum upon the goods and chattels of the plaintiff. To this plea, the plaintiff replies, that by a rule of Court, it was ordered that the writ of fieri facias, and all subsequent proceedings should be set aside for irregularity, with costs. Then the defendants rejoin, that after the making of the rule of Court, the plaintiff ruled the sheriff to return the writ, which he accordingly did, and the same remains of record. To this rejoinder, the plaintiff has demurred, and the first question, independently of the plea, is, whether or no the replication is good? It is objected that the replication merely states that the Court ordered the writ to be set aside, but that nothing appears to have been done under that order, and it may, in fact, have been abandoned. I think, however, that the replication shews, *primâ facie*, a good answer to the plea. The allegation is, "that by a rule of the Court it was ordered, that the said writ of fieri facias, and all subsequent proceedings should be set aside for irregularity, with costs, to be taxed by the Master, as by the rule, reference being thereunto had will fully appear." It seems to me, that that is a sufficient allegation of the existence of the rule of Court, and, consequently,

1841.

JONES

v.

WILLIAMS
and Others.

1841.
JONES
v.
WILLIAMS
and Others.

the effect of it was to set aside the writ of fieri facias, and prevent it from being any longer a justification to the defendant (the plaintiff in that action) or his attorney, though it would, by law, be, nevertheless, a justification to the sheriff, and all persons acting under him. It appears to me, therefore, that the replication is good. Then comes the rejoinder, which is pleaded by way of estoppel, and the question arises, whether or no this is a good rejoinder? It is contended that the plaintiff is, by his own act, estopped from saying that this is not a good writ; and it is argued, that a writ cannot, at the same time, be both good and bad. But I think that the plaintiff is not estopped from shewing that the writ was set aside; and I am also of opinion, that a writ may be at once both a good writ and a bad writ; that is to say, a writ set aside for irregularity, may be good as to the sheriff, and all persons acting under him, and bad as to the persons who sued it out. What then does the act of the plaintiff, in ruling the sheriff to return the writ, amount to? It amounts simply to this, that though the writ may be void for some purposes, yet the plaintiff may desire to make use of it for others. For instance, he may wish to question the propriety of the sheriff's charges for executing it, and may have ruled him to return it, in order to found an application to the Court, or, perhaps, to bring an action for extortion: it is enough to say, that he may make some use of a void writ. The last question is, whether it makes any difference that the writ is filed of record? I think not. The filing of record is not the act of the party, but it is the mode in which the sheriff makes his return; he returns the writ into the proper office, where it is filed of record as a matter of course. The filing of record does not affirm the existence of a void writ, and, consequently, the rejoinder is bad. With respect to the plea, I do not wish to be understood as intimating any doubt as to the propriety of the decision of the Court of Queen's Bench, in the case of *Jones v. Williams*, in which I entirely concur. Even if this replication were bad, and the rejoinder good, the utmost

effect of those pleadings would be to admit that there was a good writ; but allowing that to be the case, the party issuing it cannot justify under it, without shewing a valid judgment to support it. Then upon the face of this plea (supposing the decision of the Court of Queen's Bench to be correct, which I think it is,) it appears that a writ of fieri facias issued without any authority to warrant it. The 18th section of the 1 & 2 Vict., c. 110, enacts "that all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, &c., whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law." Then the 19th section provides, that no judgment of any of the superior law Courts, nor any decree or order of any Court of Equity, nor any rule of a Court of Common Law, &c., shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless a memorandum or minute, containing the name and place of abode, &c., of the person whose estate is intended to be affected thereby, and the Court and title of the cause and matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, and costs, or moneys thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas, &c." It seems to me, that according to the construction of the act, it does not apply to any costs, charges, or expenses, except those which are ordered by the Court to be paid, and that it does not embrace cases in which something is necessary to be done, in order to give the party a title to the money, but includes those only in which the obligation to pay the money appears upon the face of the judgment, decree, or order. But then it is argued, that where the Court orders the payment of costs, something must be done, in order to ascertain their amount before execution can issue. No doubt that it is so; but we must hold that costs are not liable to the same

1841.

JONES

v.

WILLIAMS
and Others.

1841.
JONES
v.
WILLIAMS
and Others.

observation, as they stand upon a peculiar footing. When the legislature mentions "money, costs, charges, and expenses," it means money decreed or ordered to be paid, together with the costs, charges, and expenses, ascertained in the usual way by the officers of the Court. That point it is unnecessary to decide; but I am of opinion, that with respect to costs, it is enough if they are ascertained by the officer of the Court, and that it is not necessary that there should be any order to pay after the officer has taxed them.

ALDERSON, B.—I am of the same opinion, but shall only say a few words as to the validity of the plea, which I think bad for the reasons given by my brother *Parke*. The true construction has been put upon the act by the Court of Queen's Bench, in the case of *Jones v. Williams*. With regard to the costs, charges, and expenses, it seems to me, that they may be ascertained by the officer of the Court, though not specifically mentioned in the rule of Court. All that is required is, that the Court orders a sum of money to be paid, and if it also order costs, that means the costs ascertained by the officer of the Court. Independently of the words of the act which especially refers to costs, charges, and expenses, it seems to me, that the Court may very well put such a construction upon the act as to include costs, where there is an order for the payment of a specific sum. But in the case of an award, it would be a monstrous proposition to say, that any money is payable by the order of the Court. The order of the Court is, that the party do submit to the arbitration of A. B., and unless you incorporate the award (which is an act long subsequent) with the rule of Court, it will be making the Court order the payment of a sum of money, the propriety of which depends upon the judgment of a third person, and of which the Court knows nothing. The Court might then commit the greatest injustice. Suppose a submission to arbitration and an award in Trinity Term, in the vacation a ca. sa. might issue, and is the party to remain in custody the whole of Trinity vacation before

he can apply to set aside an award which may have been most improperly made against him? The sounder rule is this, that no execution should issue, until the Court has ascertained for itself the propriety of the award, and has made an order for the payment of the money.

1841.
 JONES
 v.
 WILLIAMS
 and Others.

GURNEY, B.—I am of the same opinion.

ROLFE, B.—I am of the same opinion. The forms of writs settled by the Lord Chancellor, in pursuance of the 1 & 2 Vic. c. 110, afford a strong analogy to guide us in coming to a correct conclusion in the present case. That statute, for the first time, gave the effect of a judgment to an order of a Court of Equity for the payment of money. Let us then see what was done by the Court of Chancery, for the purpose of enforcing its decrees by common law process. It is ordered “that every person to whom, in any cause or matter pending in that Court, any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled, by his clerk in court, to sue out one or more writs of fieri facias, or writ or writs of elegit, of the form thereafter stated, or as near thereto as the circumstances of the case may require.” There are then given the forms of five different writs of fieri facias, and four of elegit. (a) The first is a writ of fieri facias on a decree or order of the Court for the payment of money. The second is on a decree or order of the Court for the payment of money and interest. The third is on a decree or order of the Court for the payment of money and costs. The fourth is on a decree or order of the Court for the payment of money, interest, and costs. The fifth is on a decree or order of the Court for the payment of costs only: then follow similar forms of writs of elegit. According to all these writs, it is assumed that the amount payable

(a) See the forms 1 Baven, xv.

1841.
 JONES
 v.
 WILLIAMS
 and Others.

is previously ascertained by the decree or order of the Court. That appears to me to mark the distinction pointed out by my brothers, *Parke* and *Alderson*, viz., that the statute having provided that a writ may be issued upon an order for the payment of money and costs, it may still issue for costs when taxed by the officer; but that the right to such execution cannot possibly extend to the payment of anything which has not, in terms, been ascertained by the decree or order. The writs to which I have referred, were framed upon great deliberation; and if there was any case, in which the order for the performance of an award could be within the statute, it is most probable that a writ for that purpose would be found amongst the forms given by the Court of Chancery.

Judgment for the plaintiff.

Doe d. The Earl of WARWICK v. ROE.

Where a notice at the foot of a declaration in ejectment required an appearance in Michaelmas Term, but service could not be effected in time to move in that Term, the Court, in Hilary Term, granted a rule for judgment against the casual ejector, unless cause was shewn before the last day but one of that Term.

WHATELY moved, in Hilary Term, for judgment against the casual ejector in a country cause. The notice at the bottom of the declaration required an appearance in Michaelmas Term, but from the numerous parties to be served, it had been found impossible to effect service upon all of them in time to move in that Term. He referred to *Right d. Jeffery v. Wrong (a)*, in this Court, in which the declaration having been served in October, with a notice to appear in Michaelmas Term, *Bayley, B.*, in Hilary Term, granted a rule for judgment, unless cause was shewn before the last day but one of the Term.

PARKE, B.—You may take a rule of the same kind.

(a) *Ante*, vol. 2, p. 348.

1841.

RICHARDSON v. JACKSON.

ASSUMPSIT for goods sold and delivered. Plea, non-assumpsit except as to 3*l.* 11*s.*, and as to that sum a tender. At the trial, before the under-sheriff of Middlesex, a witness proved that he went to the shop of the plaintiff, and saw his sister there, when he told her "that he had come to settle the defendant's account;" she then produced a book, and after looking at it, said, "she could say nothing about it, unless her brother were present;" the witness then offered her 3*l.* 11*s.* She said, that "her brother had looked over the book, and that there was one or two pounds more owing." On his cross-examination, the witness admitted that he told the plaintiff's sister, that he would not pay the money, unless she gave him a receipt for 3*l.* 11*s.* The under-sheriff left it to the jury to say, whether or no, the tender was proved, and they found a verdict for the defendant.

Though a party tendering money, demands a receipt for the sum tendered, if no objection is made on that account, the tender is good.

Chadwicke Jones had obtained a rule to set aside the verdict, and for a new trial, on the ground that the tender was not good in law.

Erle shewed cause, and contended, that as no objection was made, on account of a receipt being demanded, but only because a larger sum was claimed, the tender was good, *Cole v. Blake* (a).

C. Jones, in support of the rule. In order to support a plea of tender, there must be evidence of an unqualified offer. The demand of a receipt was a condition which the defendant had no right to impose. In *Laing v. Meader* (b), it appeared that the defendant took the money out of his pocket, and said to the plaintiff, "if you will give me a

(a) Peake, N. P. 239.

(b) 1 C. & P. 257.

1841.
RICHARDSON
v.
JACKSON.

stamped receipt, I will pay you the money," and the Court ruled that there was no proof of tender. *Abbott*, C. J., there says, "the offer of the money must be unconditional. A party has no right to say, 'I will pay you the money if you will give me a stamped receipt,' but he ought, according to the 43 Geo. 3, c. 126, to bring a receipt with him, and require the other party to sign it." [*Parke*, B.—That dictum will not apply to this case, because no stamp was necessary.] Great inconvenience would ensue, if the debtor was entitled to insist upon a receipt; in the case of a contract between two persons, neither of whom could read or write, no receipt could be given.

PARKE, B.—The case of *Cole v. Blake* is a sufficient authority to warrant the Court in deciding against the application. There, Lord *Kenyon* indeed says, "that it had been determined that a party tendering money, could not, in general, demand a receipt for the money." But where no objection is made on that account, but the creditor insists on receiving a larger sum, he cannot afterwards object to the tender, because the debtor required a receipt. Here, it appeared, that the sum tendered was sufficient to satisfy the plaintiff's demand. The rule must, therefore, be discharged.

ALDERSON, B.—I do not wish to be understood as deciding that this is not a good tender.

ROLFE, B.—I should be sorry to hold this a bad tender. In the present state of the law, I should wish to encourage every prudent person to have some evidence of his payments.

Rule discharged.



1841.

THOMPSON v. GIBSON and Another.

CASE for a nuisance to a market. At the trial before *Coltman*, J., at the last Appleby assizes, a verdict was found for the plaintiff with 1s. damages. The cause stood last on the list, and after the verdict was returned, the learned judge, according to custom, adjourned the Court to his lodgings, whither the counsel for the plaintiff shortly afterwards followed, and requested a certificate under the 3 & 4 Vict. c. 24, s. 2. The learned judge granted the certificate, and desired that the fact of his having done so should be communicated to the other party.

Ramshay obtained a rule nisi to rescind the certificate, on the ground, that by the express words of the statute, it must be given *immediately* after the trial.

Cresswell and *Cowling* shewed cause. The question depends upon the construction of the 3 & 4 Vict. c. 24, s. 2, which enacts, "that if the plaintiff in an action of trespass, or trespass on the case, &c., shall recover, by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, unless the judge or presiding officer, before whom such verdict shall be obtained, shall *immediately afterwards* certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." The word *immediately* must not be read as referable to the very moment after the verdict is returned, but must be construed as meaning within a

The 3 & 4 Vict. c. 24, s. 2, (which deprives the plaintiff of costs where, in certain actions less damages than 40s. are given, "unless the judge shall immediately afterwards certify that the action was brought to try a right, &c.") is to be construed as meaning that the judge is to certify within a reasonable time upon the facts as they appear at the trial without, being influenced by any extraneous matter, afterwards presented to his notice, therefore, where at the assizes, the jury returned a verdict for 1s. in a cause which stood last in the list, and the judge adjourned the Court to his lodgings, whither the plaintiff's counsel followed, and asked for a certificate, which was granted.

Held, that the certificate was given within a sufficient time.

1841.
 THOMPSON
 v.
 GIBSON
 and Another.

reasonable time before other business is entered upon. In the late case of *Shuttleworth v. Cocker* (a), Maule, J., considered that the word "immediately" was introduced with a view of excluding from the mind of the party certifying the operation of any matter not arising directly out of what might have passed at the trial. It must, however, be admitted, that the dicta of the other judges were opposed to that view of the statute. The construction put upon similar provisions in other acts of Parliament, would afford some assistance in construing this. The words of the 22 & 23 Car. 2, c. 9, were, "in all actions of assault and battery, wherein the judge, *at the trial of the cause*, shall not certify, &c.," yet where the certificate was given four days after the trial, but before the judge had left the assize town, it was held to be in sufficient time, and the Court said, "the words 'the judge at the trial of the cause,' meant the judge who tried the cause; they cannot be expounded literally, because the certificate cannot be granted at the trial, but only after the trial when the jury have found their verdict," *Johnson v. Stanton* (b). So a certificate under the 8 & 9 Wm. 3, c. 11, s. 4, that a trespass was wilful, might be granted within a convenient time after the trial of the cause, *Woolley v. Whitby* (c). The jury act, 6 Geo. 4, c. 10, s. 30, enacted, that the party who shall apply for a special jury, shall pay the costs occasioned thereby, unless the judge, before whom the cause is tried, shall *immediately* after the verdict certify under his hand on the back of the record, that the same was a cause proper to be tried by a special jury," and it has been always considered a sufficient compliance with the statute, if the certificate was given at any time during the day. The previous act, 24 Geo. 2, c. 18, required the certificate to be given "in open Court," but those words were omitted in the 6 Geo. 4, which shewed it was

(a) *Ante*, p. 76.

(c) 2 B. & C. 580; 4 Dowl. &

(b) 2 B. & C. 621.; 4 Dowl. & Ry. 147.
 Ry. 156.

the intention of the legislature to give the judge time for consideration. [*Alderson*, B.—If the 6 Geo. 4, was to be construed strictly, the judge, in many cases, could not certify at all; for instance, it is a common practice for the counsel on both sides to agree that a verdict shall be taken in the absence of the judge.

1841.
 THOMPSON
 v.
 GIBSON
 and Another.

Dundas and Ramsay, contra. A statute should, upon the whole, be so construed, as not to render any clause, sentence, or word superfluous, void, or insignificant, *Dwarries on Statutes*. (a) The word “immediately” cannot be rejected, and if retained, must mean either that the judge is instantly to grant the certificate, or, if he desires time for consideration, he is to notify his wish to the parties, but, at all events, the certificate is to be given before the adjournment of the Court. The legislature might have had good reasons for not allowing delay. For instance, in the case of trials or inquiries before inferior judges, it would be inconvenient and dangerous to allow them to certify after they had left the Court, and been subjected to the statements or solicitations of the parties to the suit. Besides, if the strict rule of construction was departed from, where was the relaxation to stop? Would the Court hold it sufficient for the judge to certify the next morning, or three days after the trial, or at the next assize town, or even when out of the kingdom? The practice under the jury act cannot be considered any authority in the present case, for there was no express decision to warrant it, and the decisions upon the 22 & 23 Car. 2, c. 9, and 8 & 9 Wm. 3, c. 11, s. 14, were inapplicable, for the words of those statutes are different from the present. The dicta of the judges, in *Shuttleworth v. Cocker*, were in favour of the construction contended for, and in *Gillett v. Green* (b), *Parke*, B., expressed a doubt whether a judge had power to grant a certificate after another cause had been called on.

LORD ABINGER, C. B.—With respect to the argument

(a) Vol 2, p. 658.

(b) *Ante*, p. 220.

1841.
THOMPSON
v.
GIBSON
and Another.

which has been urged, as to the danger of allowing any time to elapse, where the trial takes place before an inferior judge, there is this answer, that the judges never send writs of trial to an inferior tribunal, except in cases in which it appears that no right can come in question, as in actions of debt and the like. Upon the whole question, I cannot say that the act of Parliament is free from doubt (for we know that doubts frequently arise on acts of Parliament, which the judges are called upon to decide); but if we proceed to construe this act according to common sense, justice, and reason, there will remain no doubt upon the subject, and a liberal interpretation is all that is required to get rid of every difficulty in the matter. If, indeed, I could clearly see on the face of this statute, that the legislature intended the judge to give his certificate, without allowing the intervention of a single moment of time from the conclusion of the trial, I should, of course, defer to that authority, and entertain no further question on the subject. But it is admitted by counsel on both sides, that to put the strict interpretation is impossible, and we must, accordingly, put such a one as shall be most consistent with common sense, the general practice of the law, and the fixed principles of justice. In our language, the word “immediately” is, by a sort of metaphor, used with reference to *time*. Its proper signification is equivalent to “in medias res,” as denoting something to be done before the matters in progress are finished, but by usage it is, among us, referred to time. Now, if the expressions in this statute do not mean that the certificate is in all cases to be given instantly, the next question is, within how soon must it be given?—within a minute, within a quarter of an hour, or during the day, &c.? The answer is, that we must allow such a reasonable lapse of time, as shall exclude the danger of extraneous matter finding its way into the mind of the judge, so as to influence his judgment on the facts which came before him on the trial; and I am, on the whole, rather inclined to adopt the notion of my brother *Maule*, that the object the legislature

had in view, was to prevent the interposition of extraneous matter, and to compel the judge to decide upon the facts before him at the trial, and on no other matter or consideration whatever. If the words of the statute had been that the certificate must be given in open Court, it should then, of course, be signed *sedente curiâ*, but this section does not contain such words. So, again, if it was necessary that this certificate should be granted upon the application of counsel, it might be necessary for the judge to give it before the Court rose. But none of the statutes referred to require the application to be made by counsel, although cases may occur in which a judge is glad to hear what they have to say on the subject before he comes to any decision. I, therefore, decide this case as if the facts of it were, that the judge retired from Court after the trial, and having desired the associate to bring him the *postea*, ordered him to indorse a certificate upon it, which was accordingly done within a quarter of an hour after the trial had concluded. The fact of counsel following the judge from Court to some other place, has nothing to do with the question; the judge may, no doubt, by that means be reminded of the propriety of certifying, but I decide the case as if the judge had of himself directed the associate to indorse the certificate, under the circumstances I have mentioned, and which, I think, would be an indorsing *immediately*, within the meaning of the act, inasmuch as no other cause or matter came before the mind of the judge before he gave the certificate; and he must have given it under the impression produced on his mind by the evidence in the cause, and nothing else. Several cases have been put in the course of the argument, such as that of a judge not granting his certificate for three days after the trial, or after having left the assize county, or even the kingdom. Whenever those cases present themselves, we will decide them as well as we are able; but the only question before us, at present, is, does the use of the word *immediately*, in this statute, deprive the judge of all power of certifying a quarter of an hour after the trial is

1841.

THOMPSON

v.

GIBSON
and Another.

1841.
 THOMPSON
 v.
 GIBSON
 and Another.

over? we are of opinion that it does not, and this rule must, therefore, be discharged.

ALDERSON, B.—I am of the same opinion. I find there is an express decision upon the meaning of the word “immediately,” which is to be found in the case of *The King v. Francis* (a), where Lord Hardwicke expresses himself as follows: “It was said that the word “immediately” excludes all intermediate time and actions; but it will appear that it has not necessarily so strict a signification. *Stevens*, in his *Thesaurus*, expounds the word “immediately” by “citò et celeriter;” So *Cooper’s Dictionary* renders in English “immediately” forthwith, by and by; and *Minsheu* gives it as having various meanings, and refers it to the word “presently;” nor is its signification more confined in legal proceedings, as appears even from 2 *Lev.* 77, in the case of *Pibus v. Mitford*, which was cited to the contrary, which says, that, though the word “immediately,” in strictness, excludes all mesne time, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing. Also the statute 27 *Eliz.* c. 13, s. 11, enacts, that no person robbed shall have an action against the hundred, except he shall, with as much convenient speed as may be, give notice of the robbery to some of the inhabitants of some town near the place; and in all declarations on that statute the averment of such notice is thus, “quod immediatè post feloniam,” the plaintiff gave notice, &c., and so are all the precedents; and in *Coke’s Entries*, tit. “*Hue Cry*,” throughout it is shewn that the word “immediate” there means only with convenient speed, and convenient speed used has accordingly been always allowed to be evidence of that averment; and likewise writs of habeas corpus returnable immediately, mean only with as much convenient speed as may be. And if the meaning of the word is thus unsettled, the Court cannot say that it absolutely excludes all mesne

(a) *Cas. temp. Hard.* 114.

acts. The 9 Geo. 4, c. 31, s. 23, enacts, that whenever justices of the peace "shall dismiss any charge of assault they shall forthwith make out a certificate under their hands, stating the fact of dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." Now, by the practice under this statute, the certificate is frequently not delivered for a long time, sometimes not for months afterwards; and if the word "forthwith" were to be construed with strictness, the justices, by refusing to give a certificate at the time, might oust the defendant of his right to one altogether; for he would have no remedy but by applying for a mandamus, and even the power of a mandamus would be insufficient to destroy the existence of intermediate time. So by the 4th section of the same act, it is provided, that in cases of murder "sentence shall be pronounced immediately after the conviction of every murderer, unless the Court shall see reasonable cause for postponing the same." Now suppose a trial for murder, while that act was in operation, and that the jury retired to consider their verdict, during which another case was proceeded with, and before it was over the jury returned with a verdict of guilty, would it be contended that the judge had no power to finish the second trial, but that he must proceed immediately to pass sentence? Yet it must be so held, if that word is to have the strict construction contended for by the defendants. If, on the other hand, the view taken by Lord Hardwicke of the signification of this word is correct, the whole question comes to this; was the time which elapsed before signing the certificate, in this case, such as might reasonably be accorded to the judge for the purpose? Here, the judge, by whom the case has just been tried, adjourns to his lodgings, whither counsel follows without delay, and asks for a certificate, which is granted, now, is that a convenient and reasonable time to allow the judge to comply with the provisions of the act? I am of opinion that it is, and, consequently, that this certificate ought to be supported.

1841.
 THOMPSON
 v.
 GIBSON
 and Another.

1841.

THOMPSON

v.

GIBSON
and Another.

ROLFE, B.—I quite agree. The best test on this subject is that furnished by my brother *Maule*, which has been referred to, viz., that the certificate must be given solely on the matter itself, as it appears without the importation of anything extraneous, coupled with this, that it be given with all convenient speed. The act does not require it to be given in open Court, and, therefore, when, as was the case here, a judge adjourns the Court to his lodgings, and soon after gives a certificate, it appears to me that the statute has been sufficiently complied with.

Rule discharged.

PEARCE v. SWAIN.

A writ of summons expired on the 5th of October, and on the 5th of December, an alias issued. The plaintiff having made several ineffectual attempts to serve this latter writ, obtained a distringas which required the appearance to be entered to the first writ: *Held*, that the proceedings were regular.

HEATON moved to set aside a distringas, and all subsequent proceedings for irregularity. The first writ of summons issued on the 5th of July last, but it did not appear whether or not any attempt had been made to serve it. This writ having expired on the 5th of October, an alias writ of summons issued, dated the 5th of December. The plaintiff having made several ineffectual attempts to serve this writ, obtained a distringas, which stated that the goods were distrained in consequence of the defendant's not appearing to the first writ of summons. It was contended that the distringas was irregular, having been obtained upon the service of an alias, which was not a continuation of the first writ; and that the defendant should have been required to appear to the second, and not to the first writ, which had ceased to have any operation.

LORD ABINGER, C. B.—The first writ is not absolutely defunct, but only inoperative, for the purpose of preventing the Statute of Limitations from taking effect. I do not think the distringas irregular. It appears that four months were allowed to elapse after the suing out of the first writ, an

alias then issues, and afterwards a distringas, and the defendant is required to appear to the first writ. I cannot discover any irregularity in this. The rule must be refused.

1841.

PEARCE

v.

SWAIN.

PARKE, B.—The distringas requires the appearance to be made to the first writ, which is the commencement of the suit, the writ attempted to be served being the alias. There is no irregularity in this: a party may appear to a writ after the expiration of four months from its date. Then as to the second point. It is now settled by the case of *Norman v. Winter (a)*, that a distringas may issue, and bear teste after the expiration of a previous writ of summons. The Court of Common Pleas had indeed held, in a former case (*b*), that a distringas so issued was irregular, but they were afterwards satisfied that they were wrong; and in the case of *Norman v. Winter* they overruled their former decision. The rule is undoubtedly a reasonable one; for as a plaintiff is to have four months in which to serve his writ, and the attempt to serve it may take place on the last day, and be unsuccessful, it would be unreasonable to hold that he would not be entitled to a distringas after that time.

ALDERSON, B., concurred.

Rule refused (*c*).

(*a*) *Ante*, vol. 7, p. 304, S. C.; 506; *Abbotts v. Kelly*, 4 Scott, 256; 5 Bing. N. C. 279, and 7 Scott, 251. 3 Bing. N. C. 478, S. C.; *Sewell*

(*b*) The point has been so decided by the Court of Common Pleas, in *Lemon v. Lemon*, 2 Scott,

(*c*) See *Bromage v. Ray*, *ante*, p. 559.

HENRY v. EARL.

DEBT. The declaration stated the defendant to be indebted to the plaintiff in 12*l.* for goods sold and delivered; To debt for goods sold, &c. the defendant pleaded nun-

quam indebitatus, except as to 5*l.* 10*s.* 3*d.*, and as to that sum, he pleaded against the further maintenance of the action, payment of 5*l.* 13*s.* 7*d.* in full satisfaction and discharge of all the causes of action, relating to 5*l.* 10*s.* 3*d.*, taking no notice of the damages and costs.

Held, on special demurrer, that the plea was good, and that the plaintiff might sign judgment for any damage unanswered.

1841.

HENRY
v.
EARL.

and in 12*l*. for money found to be due on an account stated.

Plea. That except as to 5*l*. 10*s*. 3*d*., parcel of the sums in the declaration mentioned, *nunquam indebitatus*. And for a further plea as to the said sum of 5*l*. 10*s*. 3*d*., parcel, &c.; the defendant says, that the plaintiff ought not further to maintain his action thereof, because the defendant says, that after the causes of action in the declaration mentioned accrued to the plaintiffs, and after the commencement of this suit, to wit, on, &c., he, the defendant, paid to the plaintiff, who then received a large sum, to wit, 5*l*. 13*s*. 7*d*., in full satisfaction and discharge of all the causes of action in the declaration mentioned, which relate to the said sum of 5*l*. 10*s*. 3*d*., parcel, &c. Verification.

Special demurrer to the second plea, assigning for causes, that it is not alleged or stated in the said last mentioned plea, that the payment therein mentioned to have been made, was made or accepted in satisfaction and discharge of the damages and costs sustained or incurred by the plaintiff by reason of the causes of action in the declaration mentioned, which relate to the said sum of 5*l*. 10*s*. 3*d*., parcel, &c., or by reason of the detention of that sum.

The Court called on

Peacock, to support the plea. The plea only professes to be an answer to 5*l*. 10*s*. 3*d*., the amount which has been paid. Even admitting that it affords no answer to the damages, still it is a good bar to that portion of the debt to which it is pleaded, and if any part of the plaintiff's claim is left unanswered, that does not entitle him to demur, but he should sign judgment for such part. The rule of law is stated in *Wms. Saund.* (a), viz., that if a plea begin with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur; but if a plea begin only as an answer to part, and is, in truth, but an answer to

(a) Vol. 1, p. 27, n. 2.

1841.

HENRY

v.
EARL.

part, or though in law, it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by nil dicit. In the present case, the plea is not in bar, but only against the further maintenance of the action. Where in assumpsit, a similar plea alleged the payment of a sum of money in satisfaction of the defendant's promise, and of all damages, without the like allegation as to costs, the plea was held good after verdict, *Corbett v. Swinburne* (a). He also referred to *Rowe v. Young* (b), *Lyttleton v. Cross* (c), *Wollen v. Smith* (d).

H. Hill, contra. There is some damage arising from the detention of the debt, which the plea leaves altogether unanswered. In *Francis v. Crywell* (e), it was expressly decided, that a plea of payment must allege the payment to have been made in discharge of the *costs and damages* accrued by reason of the non-performance of the promises. *Corbett v. Swinburne* was an action of assumpsit, and the plea alleged the payment in satisfaction and discharge of the defendant's promise, and of all damages sustained by reason of the non-performance thereof; but this is an action of debt, and the plea answers the debt only, and says nothing as to the damage. In contemplation of law, the word "damages" includes costs, which, by the statute of Gloucester, are a consequence of detaining the debt, and are part of the damages, *Phillips v. Bacon* (f). [*Parke*, B.—Should not you sign judgment for the damages?] There is no instance of judgment being signed for damages in an action of debt.

LORD ABINGER, C. B.—I am inclined to think that this is a good plea as to so much as it professes to answer. It is pleaded, in further maintenance of the action, as to

(a) 3 Nev. Per. 551; 8 Adol. & E. 673, S. C. 165, S. C.

(b) 2 B. & B. 235.

(c) 4 B. & C. 117; 5 D. & Ry.

(d) 9 Adol. & E. 505.

(e) 4 B. & C. 886.

(f) 9 East, 298.

1841.

HENRY
v.
EARL.

5*l.* 10*s.* 3*d.* only; it does not profess to be pleaded to any damage resulting from the detention of the debt. It may be that the concluding part of the plea is larger than necessary, but that is not the ground of demurrer. No doubt costs form part of the damages resulting from the detention of the debt, and if there is no answer to those costs, the plaintiff may sign judgment for so much. Though the damages in debt are in general considered as nominal only, yet the jury may give substantial damages if they think fit. So here, if the plaintiff can shew that he is entitled to more than the plea answers in respect of damages, he may sign judgment for the part unanswered. In the ordinary case of payment of money into Court, after action brought, the plaintiff is entitled to sign judgment for his damages, otherwise a party who paid money into Court would pay no costs at all. Therefore, it is the general practice, upon payment of money into Court, to pay costs up to that time. I am, therefore, of opinion, that in the present case, notwithstanding the conclusion of the plea, the plaintiff might have signed judgment for costs, as part of the damages. If that is done, it will reconcile all the difficulty. The plea is informal, as being, in its conclusion, larger than necessary, but it is not pleaded to more than 5*l.* 10*s.* 3*d.*, and as to that sum it is good.

PARKE, B.—The plea is a good plea, and there must be

Judgment for defendant.

MEMORANDUM.

On a writ of *distringas* being moved for, Lord *Abinger*, C. B., stated that he would take that opportunity of mentioning, that in future, costs would not be allowed for more than two calls.

1841.

WHEELER v. WRIGHT.

THE declaration stated, that the plaintiff put up to sale by auction certain premises, subject to the conditions, that the purchaser should complete the purchase on or before the 25th of March then next; and that the vendor should deduce a good title to the premises, commencing with the lease under which they were held; that the defendant was the purchaser; and that although the plaintiff did deduce a good title to the premises, commencing with the lease under which they were held, yet the defendant did not, on or before the said 25th of March, or at any other time, complete the purchase.

Plea. That the said premises were demised by Thomas Lowe to William Barnett, his executors, administrators, and assigns, for a term of years, subject to a covenant by Barnett, his heirs, &c., to keep the premises in repair, and in the event of their not being in repair, that Thomas Lowe might enter and repossess them; that the right and interest of Barnett vested by assignment in the plaintiff, who suffered the premises to be out of repair, and that they were out of repair at the time of the sale and of the commencement of the suit, so that the said term might be determined at the option of Thomas Lowe; and that the plaintiff, by reason of the premises, had not any valid title to the said premises. Verification.

Special demurrer, assigning for cause, that the said plea did not sufficiently confess and avoid or traverse the cause of action; that it was but an argumentative denial of the allegation that the plaintiff deduced a good title, and ought to have concluded to the country, and not with a verification; and that the plea was a mere statement of evidence, on which no certain issue could be taken.

A declaration stated that the plaintiff put up to sale by auction, certain premises subject to the conditions that the purchaser should complete the purchase on a certain day, and that the vendor should deduce a good title to the premises commencing with the lease under which they were held; it then alleged that although the plaintiff did deduce a good title, &c., yet the defendant did not complete the purchase: Plea, that the premises were demised by L. to B., for a term of years, subject to a covenant by B. to repair, and in the event of his not repairing, that L. might enter, that the interest of B. vested in the plaintiff who suffered the premises to be out of repair, at the time of the sale, so that the term might be determined at the option of L.

Held bad, as amounting to an argumentative traverse, that the plaintiff deduced a good title.

1841.
 WHEELER
 v.
 WRIGHT.

Gale, in support of the demurrer, was stopped by the Court.

Erle, *contra*.—The plea sufficiently confesses and avoids the averments in the declaration. It admits a good *prima facie* case on the part of the plaintiff, but sets up as an answer, that the title is defeasible. It would, then, be competent for the plaintiff to reply, that although a forfeiture had occurred, it had been waived by the landlord. [*Alderson*, B.—The averment in the declaration, that the plaintiff deduced a good title to the premises, may mean, not that he made out a perfect title, but one which, having been forfeited, was set up again by the landlord's waiver, or by the repairs having been done. He has not stated merely a defeasible title. If the averment in the declaration means that the plaintiff made out a good title against all the world, then it is not answered by the plea.] The present is a case where a defendant is at liberty either to plead specially or to traverse. This may be done where the plea confesses and avoids the plaintiff's right of action by matter *ex post facto*, or where the plea answers the declaration by matter of law. *Hussey v. Jacob* (a), *Carr v. Hinchliff* (b), *Maggs v. Ames* (c). If the defendant discovers aliunde that the lease is invalid, or that the landlord had no title, he may shew those facts as an answer to the plaintiff's claim: *Shepherd v. Keatley* (d). He also cited *Crisp v. Griffiths* (e), *Spratt v. Jefferey* (f), *Jones v. Senior* (g), *Muskett v. Hill* (h).

LORD ABINGER, C. B.—I think this plea is bad on special demurrer, for it amounts to an argumentative denial of the plaintiff's being able to make good title, instead of containing

(a) 1 *Ld. Raym.* 87.

(b) 7 *Dowl. & Ry.* 42; 4 *B. & C.* 547, *S. C.*

(c) 4 *Bing.* 470; 1 *Moore & P.* 294, *S. C.*

(d) 1 *C., M. & R.* 117.

(e) 2 *C., M. & R.* 159.

(f) 10 *B. & C.* 249; 5 *Man. & Ry.* 188, *S. C.*

(g) 4 *M. & W.* 123.

(h) 5 *Bing. N. C.* 694; 7 *Scott*, 855, *S. C.*

a distinct traverse. With respect to the objection that the landlord might not have had a good title, I think, if the defendant intended to stand upon that objection, he ought to have confessed the statements in the declaration, and have averred that fact in his plea.

1841.
 WHEELER
 v.
 WRIGHT.

PARKE, B.—I am of the same opinion. The plea is an argumentative traverse of the averment in the declaration, that the plaintiff deduced a good title to the premises, commencing with the lease under which they were held. If the defendant intended to rely upon the landlord's defect of title, the plea should have confessed the statements in the declaration, and then have pointed expressly at the defect. The defendant may amend on payment of costs, otherwise there will be judgment for the plaintiff.

ALDERSON and GURNEY, B., concurred.

GIBBS v. PIKE and Another.

CASE. The declaration stated, that after the passing of a certain act of Parliament, to wit, an act made and passed in the *1st and 2nd years of the reign of her Majesty Queen Victoria*, intituled "An act for abolishing arrest on mesne process in civil actions, except in certain cases, and for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England," and before the committing of the grievances, &c., a certain suit was, and still is depending in the High Court of Chancery, before the Master of the Rolls, in which said suit Elizabeth Wells, and one Fanny Wells Freeman, Richard Freeman, Robert J. Freeman, and James W. Freeman, infants, by the said Elizabeth Wells, their next friend, were plaintiffs; and John Gibbs, and one Richard Freeman and Fanny Freeman were defendants.

It is incorrect to plead a statute as passed in the first and second years of the reign, &c., but the statute may be stated to have passed in a session, held in the first and second years, &c.

An order of the Court of Chancery, requiring the defendants in a suit to pay a certain sum into the Bank with the privity of the Accountant General, to the credit of the cause, is not

an order; which has the effect of a judgment within the provisions of the 1 & 2 Vict. c. 180, s. 18.

1841.
GIBBS
v.
PIKE
and Another.

And whereas, also, before, and at the time of the committing of the grievances, the plaintiff was, and still is, seised in his demesne, as of fee of and in divers lands, tenements, and hereditaments, with the appurtenances situate, lying, and being in the county of Kent. And the plaintiff further saith, that after the making of the said act of Parliament, and before the committing of the grievances, &c., and while the said suit was so depending, by a certain order of the Right Honourable Henry Lord Langdale, in the said suit, bearing date, &c., after reciting that Mr. *Pemberton*, and Mr. *Hallett*, of counsel for the plaintiffs, had that day moved the Court, that the defendant John Gibbs, or the said defendants, John Gibbs and Richard Freeman might be ordered, on or before the 26th day of June then next, to transfer into the name of the Accountant General of the said Court, in trust in the said cause, the sum of 1637*l.* 8*s.* 6*d.* 3*l.* per cent. Consolidated Bank Annuities, being the amount of the fund admitted by the answer of the same defendants in the said suit, to have been invested in their names, upon the trusts of the indenture or marriage settlement of the 8th day of December, 1819, in the pleadings mentioned, and to have been sold out by them on the 17th day of January 1829, or that the said defendant John Gibbs, (meaning thereby the said plaintiff), or the said defendants, John Gibbs, (meaning thereby the said plaintiff), and Richard Freeman, might be ordered, on or before the 26th day of June then next, to pay into the name of the said Accountant General, in trust in the said cause, the sum of 1404*l.* 2*s.*, admitted by the answer of the said defendants, the said John Gibbs and Richard Freeman, to have been the amount of the proceeds of the sale of the said trust fund of 1637*l.* 8*s.* 6*d.*, 3*l.* per cent, Consolidated Bank Annuities, received by the said defendant John Gibbs; and that such sum of 1104*l.* 2*s.* when so paid in, might be invested by the said Accountant General in 3*l.* per cent. Consolidated Bank Annuities, in trust in the said cause, &c. Upon hearing the said defendant's, John Gibbs, meaning the said plaintiff,

answer read, and what was alleged by the counsel on both sides, the said Right Honourable Henry Lord Langdale did order that the said defendant John Gibbs, meaning thereby the said plaintiff, should, within a month from that time pay into the Bank, with the privity of the Accountant General of that Court, to the credit of the said cause, the sum of 1404*l.* 2*s.*, admitted by the answer of the said defendants, the said John Gibbs and Richard Freeman, to have been the amount of the proceeds of the sale of the trust fund of 1637*l.* 8*s.* 6*d.*, 3*l.* per cents. Consolidated Bank Annuities, received by the said defendant the said John Gibbs, and it was ordered that such sum of 1404*l.* 2*s.* when so paid into the Bank, should be laid out in the purchase of Bank 3*l.* per cent. Annuities, in the name and with the privity of the said Accountant General, in trust in the said cause, and he was to declare the trust thereof accordingly, subject to the further order of the said Court. And for the purposes aforesaid, the said Accountant General was to draw on the Bank, according to the form prescribed by the act of Parliament, and the general rules and orders of the said Court in that case made and provided. And the said John Gibbs in fact saith, that after the making of the said order of the said Right Honourable Henry Lord Langdale, they, the said Charles Andrews Pike, and Elizabeth Wells, well knowing the premises, and well knowing, as the fact was and is, that the said order was not a decree or order of a Court of Equity, whereby any sum of money or any costs, charges, or expenses, were payable to any person within the said act of Parliament, or the intent or meaning thereof, but contriving and intending to oppress, harass, and aggrieve the said John Gibbs, and to prevent him from disposing of any part of the said lands, tenements, and hereditaments with the appurtenances of him the said John Gibbs, and to deprive him thereby of the means of paying the said sum of 1404*l.* 2*s.*, in the said order specified, and satisfying the said order, and to injure and prejudice him in his credit and circumstances, to wit, on, &c., wrongfully

1841.

GIBBS

v.

PIKE

and Another.

1841.
GIBBS
v.
PIKE
and Another.

maliciously, oppressively, and unlawfully, and under colour and pretence of the said last mentioned act of Parliament, left, and caused, and procured to be left with the senior Master of the Court of Common Pleas, at Westminster, a certain memorandum or minute, in writing, containing the name, and the usual, or last known place of abode, and the title, trade, or profession of the said John Gibbs (the said plaintiff), whose estate was intended to be affected thereby, and the Court, and the title of the cause in which such order was obtained and made, and the date of such order, and the amount of the monies thereby ordered to be paid, and which same particulars contained in the said memorandum or minute, so left, and caused and procured to be left, by the said Charles Andrews Pike and Elizabeth Wells, as aforesaid, was, by such leaving as aforesaid, and by, and through the wrongful, malicious, and unlawful procurement of the said Charles Andrews Pike and Elizabeth Wells, forthwith entered in a book by the said senior Master of the Court of Common Pleas, according to the provisions of the said act of Parliament, as and for a memorandum or minute, in writing, of a decree or order of a Court of Equity, whereby a sum of money, or certain costs, charges, and expenses were payable to a person within the said act, whereby, after such entry, by the said senior Master of the Court of Common Pleas, as aforesaid, had been made, as aforesaid, it then and there appeared, from and on the face of such entry in the said book, as aforesaid, that the said order, so made by the Right Hon. Henry Lord Langdale, so being the Master of the Rolls, as aforesaid, was an order within the intent and meaning of the said act of Parliament, that is to say, an order of a Court of Equity, whereby the said sum of 1404*l.* 2*s.* was payable to the said Elizabeth Wells, &c., and had the effect of a judgment in a superior Court of Common Law, affecting the said lands, tenements, and hereditaments of the said John Gibbs, and that the said Elizabeth Wells, and that the said Fanny Wells Freeman, Richard Freeman, Robert John Freeman, and James

William Freeman, were thereby to be deemed judgment creditors, within the meaning of the said act, by means of which said several premises, and by reason of the said order, from such entry so made, as aforesaid, appearing, and purporting to have the effect of a judgment against the said John Gibbs, and so effecting the said lands, tenements, and hereditaments of the said John Gibbs, as aforesaid, by such wrongful, malicious, and unlawful procurement of the said Charles Andrews Pike and the said Elizabeth Wells, as aforesaid, he, the said John Gibbs, has been hindered and prevented from selling and disposing of certain lands, tenements, and hereditaments of him, the said John Gibbs, which he otherwise might, and would have sold and disposed of for divers large prices and sums of money, for the purpose of paying the said sum of 1404*l.* 2*s.*, in the said order mentioned, &c.

1841.
 GIBBS
 v.
 PIKE
 and Another.

Special demurrer, assigning for causes that the order in the declaration mentioned, appears, on the face of the declaration, to be an order within the said act of Parliament, and the intent and meaning thereof; and no sufficient cause of action is, therefore, shewn against the defendants. And that it does not appear, with sufficient certainty, when the said act of Parliament, in the said declaration, firstly mentioned, was made or passed; and for that the declaration should have averred (if such were the fact), that the said act of Parliament was made and passed in a session of Parliament, held in the first and second years of the reign of her said Majesty.

Hayes, in support of the demurrer. The case of *Rex v. Biers* (a) is an authority to shew, that it is incorrect to state a statute as passed in two years of a reign. There, the defendant was convicted on an indictment which referred to a statute as made and passed in the second and third years of the reign of his Majesty, and the Court arrested

(a) 1 Adol. & E. 327; 3 Nev. & Man. 475, S. C.

1841.
 GIBBS
 v.
 PIKE
 and Another.

the judgment, although the statute was recited in a subsequent act, as passed in the second and third years.

PARKE, B.—There is no doubt the statute is incorrectly described.

The Court then called on

Platt, in support of the declaration. Where a statute has passed in a session of Parliament, begun in one year of the reign and continued in another, it is usual to describe it as of both years. The mode of description is recognized in *Rann v. Green* (b), where Lord Mansfield says:—"In some reigns, as in Car. 2 and Geo. 2, it happens that the Parliament meets in one year of the reign, and continues during part of the next year. In that case the method is to entitle the statute as of both years."

PARKE, B.—That means, that a statute may be stated to have been made, and passed in a session of Parliament held in both years, but it is clearly incorrect to state the statute itself to have passed in two years, since all acts take effect from the time of receiving the royal assent, unless otherwise provided for.

LORD ABINGER, C. B.—With respect to the other point there can be no doubt, that the order of the Court of Chancery, set out in the declaration, is not an order within the terms of the 18th section of the 1 & 2 Vict. c. 110 (b). Both parties had better amend.

Amendment accordingly.

(a) Cowp. 474. From this case, it seems that the statutes passed in the joint reign of Philip and Mary are exceptions to the general rule laid down in the text, and that the only correct description of an act passed in their

reign, is the second and third, or the third and fourth, as the second of Philip is contemporaneous with the third of Mary, and so on till the death of Mary.

(b) See *Jones v. Williams*, ante, p. 702.

1841.

ROSS v. JACQUES.

CROSS applied for a rule, to shew cause why all further proceedings in this cause should not be stayed, or why the plaintiff should not give security for costs. It appeared from the affidavits, that a former action had been brought by the plaintiff against the defendant for the same cause of action, which had been settled by the defendant paying the debt and costs. [*Alderson, B.*—That may be pleaded as a defence to the action, it is no ground for staying the proceedings.] The affidavits also stated facts, from which it might be inferred, that the plaintiff was not in a situation to pay costs in the event of his failing in this action, and a belief that he was in very poor circumstances. Orders had been made, requiring the plaintiff to give particulars of his place of abode. Several different statements of the plaintiff's residence had been given by his attorney, but at neither of those places was the plaintiff to be found, nor had the defendant been able to ascertain where he resided. It was true, that the Court would not, in general, interfere in a summary way, but it appeared from the books, that under particular circumstances they would do so. At all events, the Court would call on the plaintiff to give security for costs.

The Court will not stay proceedings in an action, although it is distinctly sworn that the sum claimed has been recovered in a former action between the same parties, and that the plaintiff is in poor circumstances, and unable to pay costs if he fails.

The poverty of a plaintiff is no reason for requiring security for costs.

ALDERSON, B.—We cannot determine upon affidavits, whether or not this action is brought for the sum recovered in the other, but defendant must plead the former recovery in bar; the plaintiff is within the jurisdiction of the Court, and his poverty is no reason why he should give security for costs. The case of a plaintiff who sues in formâ pauperis shews that.

Rule refused.

1841.

PHIPPS v. FIELD.

The directions to taxing officers authorizing them to allow 1*l.* 18*s.* for declaration, &c., on a bill of exchange do not apply where more than one action is brought on the same bill, but in such case the declarations must be taxed according to their length.

V. WILLIAMS shewed cause against a rule obtained by *Jervis*, calling on the plaintiff to show cause why the Master should not review his taxation. Two actions had been brought on a bill of exchange, and the Master, in the present action, had allowed the plaintiff 1*l.* 18*s.* for the declaration. It was objected, that the directions to taxing officers authorizing them to allow that amount, did not apply where two actions were brought on the same bill, but that in such case, the declarations must be taxed according to their length.

PARKE, B.—In *Archbold's Practice* (a), it is said, that “in actions to which the rule of T. T., 1 Wm. 4, for shortening declarations, applies, if the debt amounts to 20*l.* and upwards, and the declaration is under twenty-four folios, the officer who taxes the costs is authorized to allow for declaration, including instructions, copy, and delivery, 1*l.* 18*s.*, and for close copy, in country causes, according to length. But the above regulations are not to extend to cases in which several actions are brought on the same bill or note against several parties thereto, and the taxing officer may allow, at his discretion, to a plaintiff or defendant all such costs as shall have been reasonably incurred by him after commencement of suit.” The Master certifies that the practice is correctly stated, and that where there is more than one action on the same bill, the declarations must be taxed according to their length.

ALDERSON, B., concurred.

Rule absolute.

(a) P. 1190.

1841.

BENNISON v. THELWELL.

ASSUMPSIT on a bill of exchange, drawn by H. and R. Daniel upon and accepted by the defendant for 200*l.*, three months after date, and indorsed by H. and R. Daniel to the plaintiff.

Plea. That after the bill became due, and before the commencement of the suit, the defendant, by the said H. and R. Daniel, his agents, duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of the said H. and R. Daniel, as such agents, a large sum of money, amounting to 210*l.*, in full satisfaction and discharge of all the causes and rights of action.

Replication. That the defendant, by the said H. and R. Daniel, his agents, did not pay to the plaintiffs, nor did the plaintiff accept or receive of the said H. and R. Daniel, as such agents, the said sum of money in the said plea mentioned, in full satisfaction and discharge of the premises in the said plea in that behalf mentioned, modo et formâ.

Special demurrer, assigning for cause, that it is ambiguous and uncertain, from the said replication, whether the issue raised by the same is whether the payment in the plea mentioned was made at all, or whether the said H. and R. Daniel were the authorized agents of the defendant in the making of the same? That the plaintiffs have not taken or tendered any single or material issue out of or upon the said plea of the defendant, but have stated and put in issue both, that the plaintiffs did not accept and receive from the said H. and R. Daniel the said sum of money. And also that the said H. and R. Daniel were not the agents of the defendant; and also, for that the said replication is bad as containing a negative pregnant with an affirmative.

To assumpsit by indorsee against acceptor of a bill of exchange, the defendant pleaded that he by D., his agent duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of D., as such agent, a sum, in satisfaction and discharge of the cause of action: Replication, that the defendant, by the said D., his agent, did not pay to the plaintiff, nor did the plaintiff accept or receive of D., as such agent, the said sum in satisfaction, &c.

Held, good on special demurrer.

Crompton, in support of the demurrer. The replication is double, and amounts to a negative pregnant. It traverses

1841.
 BENNISON
 v.
 THELWELL.

both the authority of H. and R. Daniel, and also the receipt in satisfaction. [*Parke*, B.—Since the case of *Webb v. Weatherby* (a), it cannot be contended that the plea is double.] The authorities shew that it is objectionable on the other ground. In trespass for entering the plaintiff's house the defendant pleaded, that the plaintiff's daughter gave him license to do so, and that he entered by that license; the plaintiff replied that he did not enter by her license; this was considered as a negative pregnant, and it was held that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together (b). So where in trespass for assault and battery, the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, the defendant moderately chastised him; the plaintiff denied that the defendant moderately chastised him, and this traverse was held to be a negative pregnant; for, while it apparently meant to put in issue only the question of excess, (admitting by implication the chastisement,) it did not necessarily and distinctly make that admission, and was, therefore, ambiguous in its form (c). In the present case, the replication does not expressly admit or deny either of the propositions contained in the plea.

Barstow, contra.—Under the old form of pleading, these matters would have been raised by the general issue, and it was never intended that the new rules should place the parties under any difficulty. If the defendant makes the agency a part of his defence, the plaintiff has a right to traverse it. It is conceded that *de injuriâ* would not have been a good replication, but where several facts are so connected as to form but one entire defence, the whole may be traversed.

PARKE, B.—To a plea of payment by an agent, it would be a good replication to say, that the defendant did not by

(a) 1 Scott, 477.

(b) *Myn v. Cole*, Cro. Jac. 87.

(c) *Aubery v. James*, Vent. 70;

Stephen on Plead. 425, 2nd edit.

his agent in that behalf pay, &c. The case of *Webb v. Weatherby* shews, that where two matters form but one defence both may be traversed.

1841.
BENNISON
v.
THELWELL.

LORD ABINGER, C. B.—The only material issue raised by the replication is the payment and acceptance by the plaintiff in satisfaction.

Judgment for the plaintiff.

WATSON v. FRAZER.

IN this case, the plaintiff, who was an infant, sued by his next friend, and a rule had been obtained, calling on him to shew cause why all proceedings should not be stayed until the prochein amy should give security for costs, or another prochein amy be appointed. The rule was obtained upon affidavit that the prochein amy was, at the time he was appointed, and still was, an uncertificated bankrupt.

Where in an action, by an infant, a person, (not the father,) was appointed prochein amy, who, it afterwards appeared was an uncertificated bankrupt, the Court stayed the proceedings until he should give security for costs, or another prochein amy should be appointed.

Platt shewed cause, and contended, that the authorities clearly shewed, that an infant plaintiff could not be compelled to give security for costs, even though his prochein amy was proved to be insolvent. He referred to *Anonymous*, 1 *Marsh*, 4, *Yarworth v. Mitchell* (a), *Anonymous*, 2 *Chit.* 359, *Tidd's New Prac.* 62.

Addison, in support of the rule. If it had been suggested at the time of the appointment, that the party proposed as prochein amy was an uncertificated bankrupt, the Court would not have appointed him. In *Doe d. Selby v. Alston* (b), *Buller*, J., in enumerating the instances in which the Court will oblige the plaintiff to give security for costs, states, that when an infant sues, the Court will oblige his prochein amy, or guardian, or attorney, to give such security.

(a) 2 D. & R. 423.

(b) 1 T. R. 491.

1841.

WATSON
v.
FRAZER.

In *Mann v. Berthen* (a), the Court required a guardian, who was sworn to be in insolvent circumstances, to give security for costs. [*Parke, B.—Yarworth v. Mitchell* is cited in that case, and must be considered as overruled by it.] The case in 2 *Chit.*, 359, was decided solely upon the ground that the application was too late. In *Heasford v. Knight* (b), where the plaintiff was discharged under the Insolvent Act, after issue joined, and before notice of trial given, the Court stayed proceedings until the assignee, or some creditor of the plaintiff should give security for costs. An uncertificated bankrupt bringing trover will be required to give security for costs, *Webb v. Ward* (c).

PARKE, B.—It is entirely in the discretion of the Court to appoint a proper person to be prochein amy. The object is to protect the rights of the infant; and I by no means wish to lay down, as a general rule, that it is any objection to a prochein amy that he is poor, but in this case there has been a sort of imposition practised on the Court in procuring the appointment of an improper person. The father is the person who is naturally entitled to take care of the infant, but instead of him, a person is brought forward who is incapable of holding any property whatever. If that fact had been represented to the Court they would not have made the appointment. It is highly improper that such a person should be appointed, as all the property which he may obtain would belong to his assignees. The rule must be absolute.

Rule absolute.

(a) 4 M. & P. 215.

Ry. 81.

(b) 2 B. & C. 579; 4 Dowl. &

(c) 7 T. R. 296.

1841.

BENN v. BATEMAN.

THIS was an action of trespass quare clausum fregit. The defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the close; thirdly, a prescriptive right of common of pasture; fourthly, a similar right of common of turbary. The plaintiff joined issue on the first and second pleas, traversed the rights alleged in the third and fourth pleas, and new assigned excess. The defendant to the new assignment paid 10s. into Court, which the plaintiff accepted in satisfaction, and entered a nolle prosequi as to the residue of the causes of action. The Master, on taxation, allowed the plaintiff the costs of the writ, of part of the declaration, the fees to counsel, and Term fees, together with the costs of the new assignment.

To trespass quare clausum fregit, the defendant pleaded the general issue, and also special pleas of prescriptive rights; the plaintiff denied these rights, and new assigned excess. The defendant paid money into Court, upon the new assignment which the plaintiff accepted in satisfaction, and entered a nolle prosequi as to the other causes of action.

Held, that the defendant was not entitled to the general costs of the cause.

Hoggins had obtained a rule to shew cause why the Master should not review his taxation, by allowing the defendant the general costs of the cause, and the plaintiff the costs of the new assignment only.

Hugh Hill shewed cause, and referred to the note to *Greene v. Jones* (b).

Hoggins, in support of the rule, cited the case of *Griffiths v. Jones*, from 1 *Meeson & Welsby's Reports* (a), p. 731.

PARKE, B.—The marginal note to that case is incorrect; there is nothing in the case itself to warrant the statement that the defendant was entitled to the general costs. We think the Master is right in his taxation, and the rule must be discharged.

ALDERSON, B.—In the case of *Griffiths v. Jones*, there is not a word about the general costs of the cause, and the

(a) 1 Wms. Saund. 300 a.

(b) S. C. *Ante*, vol. 5, p. 167.

1841.

BENN

v.

BATEMAN.

Court never meant that the defendant was entitled to them. I also think the taxation in the present case right.

Rule discharged with costs.

LOCKLEY v. PYE, Sheriff of STAFFORDSHIRE.

A party took a house and fixtures which were valued as between outgoing and incoming tenant, and paid for them accordingly. Subsequently, he employed an auctioneer to sell the fixtures, but before the sale took place, they were seized by the sheriff under an execution against a former owner. The sheriff employed the same auctioneer to sell the fixtures, when they realized an amount far below the original valuation.

Held, that in an action against the sheriff, the jury might give damages to the full amount of the original valuation.

TRESPASS. The first count was for the seizing and taking the plaintiff's goods: the second for breaking and entering his house, pulling down and severing his fixtures, and turning himself and servant out of possession. Pleas. First, not guilty; second, to the first count, that the goods were not the goods of the plaintiff; and thirdly, to the second count, that the house and fixtures were not the plaintiffs.

At the trial before *Gurney*, B., at the last Staffordshire Assizes, it appeared that the plaintiff had, some time previously, taken possession of the house, fixtures, and furniture, under an assignment from one Mason. The plaintiff paid 80*l.* for the lease, and the fixtures and goods were purchased at a valuation, as between an outgoing and an incoming tenant, of 109*l.* 15*s.* 10*d.* The plaintiff afterwards commissioned the auctioneer, who had valued the goods, to sell them; but before he could do so, the defendant, as Sheriff of Staffordshire, entered and seized under colour of a writ of execution against the goods of Mason. The same auctioneer was employed by the sheriff to sell the goods, and when sold they produced only 73*l.*, the plaintiff himself being a purchaser to the extent of 20*l.* The learned judge told the jury that as to the amount of damages he thought the least they could give the plaintiff was the sum he had paid for the goods. The plaintiff had a verdict for 109*l.* 15*s.* 10*d.* on the first, and for 25*l.* on the second count.

Bayley now moved for a rule, to shew cause why there should not be a new trial, or why the amount of the verdict on the first count should not be reduced by the sum of 40*l.* The damages were assessed on a wrong principle, the plain-

tiff had no just cause of complaint, inasmuch as he had himself directed the goods to be sold, and the sale under the execution was conducted by the same auctioneer that he had employed. The fact of the sale being directed by the defendant could not damnify him; the jury ought, therefore, to have assessed the damages at the amount which the goods produced, minus the expenses of the sale. The observations of the judge, though not a misdirection, was too strong, and calculated to mislead the jury. [*Alderson, B.*—A trespasser has no right to value the goods on which he commits a trespass]. The plaintiff was certainly not entitled to make a profit of the trespass.

1841.
 LOCKLEY
 v.
 PYE,
 Sheriff of
 STAFFORD-
 SHIRE.

ALDERSON, B.—It was entirely a question for the jury what damages they would allow. Juries have not generally much compassion for trespassers, and I don't think they are bound to weigh in golden scales how much injury a party sustains by a trespass.

GURNEY and ROLFE, B.'s., concurred.

Rule refused.

SPAIN v. CADELL. SAME v. SAME.

THESE actions (one of which was trespass quare clausum fregit, and the other case for diverting a watercourse) came on for trial at the Kent Summer Assizes, 1840, when a verdict was taken by consent for the damages laid in the declaration, subject to the award of an arbitrator. By the order of reference, it was provided, "that the arbitrator should have the same power to certify, as a judge at nisi prius." The arbitrator by his award directed verdicts to be entered in both actions on certain issues for the plaintiff,

An action of trespass was referred to arbitration, and by the order of reference, the arbitrator was to have the same power to certify as a judge at nisi prius. The arbitrator found for the plaintiff, with 1s. damages, and

certified in his award, under the 3 & 4 Vict. c. 24, that the action was brought to try a right besides the mere right to recover damage.

Held, that the certificate was valid, and that it need not be indorsed on the back of the record.

Held, also, that in such case, the certificate must be given at the time of making the award.

1841.

SPAIN
v.
CADELL.
SAME
v.
SAME.

and assessed the damages on those issues at 1s. and certified in his award under the 3 & 4 Vict. c. 24, that the actions were brought to try a right, besides the mere right to recover damages for the trespass or grievance. On taxation before the Master, it was objected that the certificate was insufficient, and the allocatur was staid in order to give the defendant an opportunity of taking the opinion of the Court as to its validity.

Thesiger now moved accordingly. The certificate is of no avail. The 3 & 4 Vict. c. 24, enacts, "that if the plaintiff in any action of trespass, or trespass on the case, shall recover by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, unless the judge or presiding officer, before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for that trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." The statute expressly limits the power of certifying to the judge or presiding officer, and requires the certificate to be indorsed on the back of the record. Where, on a writ of trial, a verdict was taken for the plaintiff with nominal damages, subject to a reference, both parties consenting that the arbitrator should have power to order a verdict to be entered for either party, which the arbitrator did accordingly, the Court set it aside, on the ground that the sheriff, to whom the writ of trial was directed, had no right to delegate his authority, and was bound to try the case sent to him. So here, the power which the legislature has vested in the judge, cannot be delegated to the arbitrator. At all events the certificate should have been indorsed on the back of the record. By the order of refer-

ence the arbitrator is to have the same power to certify as a judge at nisi prius. That power is confined to a certificate on the back of the record, the judge could not certify in any other mode. A mere statement in the award of the arbitrator's opinion is not a compliance with the statute. Besides, if judgment be entered up for the costs, there will be error on the record, inasmuch as it will appear that the Court have given judgment for costs in a case in which the statute expressly enacts that the plaintiff shall not recover them. The proper mode would have been for the arbitrator to have entered a suggestion on the record.

ALDERSON, B.—I am of opinion that no rule ought to be granted in this case. It seems to me that the parties are concluded by their own agreement, upon which we must put a reasonable construction. By the order of reference, the parties have consented that the arbitrator shall stand in the same situation, and have the same power to certify as a judge at nisi prius. They have then given the arbitrator the same authority as a judge possesses, to determine whether or not the verdict is to carry costs; I certainly am of opinion that the arbitrator, who is invested with such a power, by consent of the parties, must, in all substantial points, follow the directions of the statute; that is to say, he must give his opinion immediately on the matter, he cannot make his award at one time and certify at another. That is, in substance, the power possessed by the judge at nisi prius, and as the latter is by the statute required to indorse his certificate on the record at the time of trial (*a*), so it would be altogether a nugatory act, and not fulfilling the intention of the parties, if the arbitrator was to give a certificate on any subsequent occasion. He is bound to carry the agreement into effect, *cy-près*, the mode of doing which is by immediately inserting his certificate in the award. By this construction, the intention of the parties can be carried

1841.

SPAIN

v.

CADRELL.

SAME

v.

SAME.

(a) See *Thompson v. Gibson*, *ante*, p. 717.

1841.

SPAIN

v.

CADELL.

SAME

v.

SAME.

into effect, and we think we can adopt it consistently with the provisions of the act.

GURNEY and ROLFE, B's., concurred.

Lord ABINGER, C. B., and PARKE, B. were absent.

—◆—
BRAINE *v.* MANSON (*a*).

(*Before Parke, B., sitting alone*).

A consent to a judge's order for judgment and execution is not within the 9th section of the 1 & 2 Vict. c. 110, and, therefore, the order is valid, though neither the defendant nor his attorney attended before the judge.

FISH had obtained a rule nisi, to set aside the order of Gurney, B., and the judgment and execution founded on it. The action was brought against the defendant, as indorser of a promissory note, and after notice of trial had been given, the defendant consented to a judge's order for payment of debt and costs on a certain day, with liberty to sign judgment, if not paid. An order was drawn up accordingly. Amongst other objections, it was urged that an order of this description was, in effect, a cognovit, and should be made with all the formalities required by the ninth section of the 1 & 2 Vict. c. 110.

Byles shewed cause upon an affidavit, which stated that the defendant attended before the learned judge at the time the order was made and consented to it.

PARKE, B.—The objection that an order of this description is an evasion of the 1 & 2 Vict. c. 110, s. 9, cannot apply to cases in which the party, or his attorney goes before a judge and consents to the order. The result is, that the rule must be discharged.

Rule discharged.

(*a*) This case was decided in Trinity Term, but is inserted early on account of its importance.

Subsequently *Bayley* moved to set aside the judgment and execution founded on a judge's order in another case. The defendant had consented to the judge's order being drawn up, but neither he nor any person on his behalf attended before the judge at the time the order was made.

1841.
BRAINÉ
v.
MANSON.

PARKE, B.—I am not disposed to grant a rule, because I think it beneficial for defendants that orders of this kind should be sanctioned. There can be no doubt whatever, that the order is valid where the defendant, or his attorney, attends before the judge; but my only doubt is, whether, in causes like this, where a simple consent is given, it may not be considered as an evasion of the 1 & 2 Vict. c. 110, s. 9? I will take time to consider.

On a subsequent day, *Parke*, B., stated that he had consulted with the other judges, and that they all agreed that there should be no rule.

Rule refused.

FOSTER v. PRYME.

CLEASBY had obtained a rule nisi for setting aside judgment of non pros for irregularity. The writ of summons was served on the 13th April, and on the 7th May (the last day but one of Easter Term) an appearance was entered for the 19th May; the defendant served the plaintiff with a demand of declaration, and on the 2nd June signed judgment of non pros.

Judgment of non pros for not declaring cannot be signed before the end of the Term next, after an appearance is entered.

Petersdorff shewed cause. The plaintiff was bound to declare before the end of the Term next after the service of the writ. Under the old practice in actions by bill, if an appearance was entered of the Term in which the process was returnable, the plaintiff had the whole of the following Term to declare in; but inasmuch as an appearance may now be entered by defendant in Vacation as well as in Term, the plaintiff ought to declare within the Term next

1841.

FOSTER

v.
PRYME.

after the execution of the writ, 1 *Archb. Prac.* 283 (a). Here the writ was served before Easter Term, and the judgment was signed in Trinity Term.

Cleasby, in support of the rule. The plaintiff has the whole of the Term, after the defendant has entered an appearance, to declare in. The correct practice is stated in *Lush's Prac.* 336, where it is said, that "the plaintiff is not compellable to declare until the end of the Term next after that in, or of which the appearance was entered, it being enacted, by 13 Car. 2, st. 2, s. 3, that upon appearance to be entered in the Term wherein the process is returnable, with the respective officers in that behalf for the said person or persons, by attorney or attorneys, in the said respective Courts from whence the said process issued, unto such process, unless the plaintiff, in such process named, shall put into the Court from whence such process did issue, his declaration against the person so arrested, in some personal action or ejectione firmæ of lands or tenements, before the end of the Term next following after appearance; that then a nonsuit for want of a declaration may be entered against the plaintiff in the said Courts respectively. The judgment of non pros, given by this statute, differs from the nonsuit upon an original at common law, though in terms confined toailable actions, it has always been construed as applicable also to serviceable process. The defendant must appear by attorney at such a time that his appearance may have relation back to the return of the writ. Accordingly, the judgment states the appearance to have been made on the return day. As the appearance must now be dated of the day on which it is entered, and the doctrine of relation is abolished, it would seem, that in order to avail himself of

(a) In Tidd's Supp. 224, it is said "that on serviceable process, when the appearance is entered in Vacation, the plaintiff must declare before the end of the next Term, after such appearance, or

on the writ of capias before the end of the next Term, after the eighth day inclusive, from the execution of the writ, otherwise a judgment of non pros may be signed."

the statute, the defendant must cause it to be entered on the eighth day inclusive after the service."

1841.

FOSTER

v.

PRYME.

ALDERSON, B.—Whether the appearance be entered in Term or Vacation, the plaintiff has the whole of the Term next after such appearance is entered to declare in. Here, the appearance was entered in Easter Term, and judgment was signed before the expiration of Trinity Term, therefore the rule must be absolute.

Rule absolute.

SHIELD v. TWIGG.

PETERSDORFF had obtained a rule nisi to set aside the judgment signed in this case for irregularity. The declaration contained a count for work and labour, and also a count for money due on an account stated. The defendant pleaded *nunquam indebitatus* to the whole declaration, and also a special plea, concluding with a verification. The latter plea, according to the practice, required counsel's signature, and that not having been obtained, the plaintiff signed judgment. By the present rule it was sought to set aside that judgment, on the ground that, as there was one plea to the whole declaration which did not require counsel's signature, the judgment was irregular.

Where a special plea requiring counsel's signature, is delivered without it, the plaintiff may sign judgment, notwithstanding there are other pleas to the whole declaration, which do not require counsel's signature.

Jervis shewed cause. The special plea not having been signed by counsel, renders the whole a nullity, and by R. Q. B. E. T. 18 Car. 2, the plaintiff is entitled to sign judgment, 2 *Tidd's Prac.* 567. Where the signature of counsel was indorsed on the plea, instead of being subscribed at the foot of it, the plea was held a nullity. *Grant v. — (a), Macher v. Billing (b)*, is expressly in point, there

(a) 2 Chit. Rep. 319.

(b) 1 C., M. & R. 577; *Ante*, vol. 3, p. 246.

1841.

SHIELD

v.

TWIGG.

the general issue was pleaded to part of a declaration, and the Statute of Limitations to the residue, and the latter plea not having been signed by counsel, the whole was held a nullity.

Petersdorff, in support of the rule. A plea valid, and complete of itself, cannot be rendered a nullity by the simple fact of it being joined with another plea which is defective. The rule of 18 Car. 2, does not apply, for that rule only extends to pleas which were filed under the old practice. In *Macher v. Billing* there was no good plea that went to the whole cause of action, which distinguishes that case from the present. *Spencer v. Cartlick* (a) is in favour of the defendant; there, the declaration contained a count on a promissory note, and on an account stated: to the first count the defendant pleaded no consideration; and to the latter the general issue, and delivered them without counsel's signature, the plaintiff having signed judgment on the whole declaration. *Patteson*, J., at chambers, set it aside. [Lord Abinger, C. B.—There, the judgment was clearly signed for too much, because the bad plea was confined to one count, and there was a good defence to the other.] In *Pepperell v. Burrell* (b), which was a rule to set aside an interlocutory judgment, on the ground that it had been signed before the time for pleading had expired. *Alderson*, B., in the course of the argument, observes, that “the plea, concluding with a verification, not being signed by counsel, may be a nullity, but what becomes of the general issue?”

LORD ABINGER, C. B.—This rule must be discharged. If plaintiffs, in cases like the present, were not allowed to treat the whole as a nullity and sign judgment, they would be placed under great difficulties. What is a plaintiff in such a case to do? If he makes up the issue and delivers the pleas as he has received them, he thereby waives the

(a) *Ante*, vol. 3, p. 247, n.

(b) 1 C., M. & R. 372.

irregularity, if he takes out a summons, and goes before a judge to set aside the bad one, he loses time, and his adversary gains a delay to which he is not entitled. Then would any pleader advise his client to make up the issue, putting in only the pleas which are in form? Under these difficulties, the only remedy is to allow the party to sign judgment at once, and leave it to the other side to come in and have it set aside on terms, if the Court will consent to such a course. We have here a certificate from one of the Masters of this Court, for some of the present Masters were clerks in Court under the old system, as to what was the ancient practice on this subject, when all pleas were filed instead of being delivered between the parties, and he certifies to us, that pleas filed without counsel's signature were considered as no pleas at all. Now, though the Court has been thrown open, and the practice changed into a delivery between the attornies of the parties, no rule has been made to change, nor do we see any reason to change the ancient practice on the subject; and, consequently, if a party delivers, without counsel's signature, a plea which requires it, together with others which do not require counsel's signature, the whole may be treated as a nullity. If there were any decided case to the contrary, I should have deferred to its authority; but none of those which have been referred to are in point, and the loose dictum thrown out in one of them by one of my learned brothers now present, cannot be taken as a declaration of the opinion of the Court.

ALDERSON, B.—What I said in the case of *Pepperell v. Burrell*, was a mere suggestion thrown out to counsel in the course of the argument, and which has been properly answered in the judgment just given by my Lord Chief Baron. Where a plea which requires counsel's signature is delivered without it, though there are other pleas which do not require signature, the plaintiff may treat the whole as a nullity. That appears to have been the practice under the old system, by analogy to which, the parties to whom

1841.

SHIELD
v.
TWIGG.

1841.

SHIELD

v.
TWIGG.

pleas are delivered under such circumstances, ought to have the power of rejecting the whole. That gets rid of the difficulty, with which I should otherwise have been much pressed, in deciding on this question. Is the party, to whom the pleas are delivered, to be obliged to make a selection between the good and bad pleas, and determine whether each particular plea is a nullity or not? If he accepts the bad plea, and, instead of signing judgment, proceeds to reply to it, he cures the irregularity. That he certainly ought not to be called on to do, and if he proceeds to set it aside, delay and expense will be imposed on him. I also concur in the opinion of my Lord Chief Baron, that this application is, under the circumstances, made too late.

ROLFE, B.—I am of the same opinion. I felt myself at one time pressed by the argument of Mr. *Petersdorff*, but when we come to compare the present with the old practice, all doubt on the subject will disappear. When a defendant delivers his pleas regularly and properly, he is under no difficulty; but if he neglects to comply with this condition, he is not entitled to call on the plaintiff to pick out the part which is a nullity.

Rule discharged.

FRASER (Public Officer, &c.) v. WELSH and Others.

To an action by indorsee against drawer of a bill of exchange, the defendant pleaded

that after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to certain persons, whose names are to the defendant unknown, and who, from the time of such indorsement, until, and at, and after the time when the bill became due, and when the action was commenced, were the holders thereof: Replication, that the said persons in the plea mentioned, were not, when the action was commenced, the holders of the bill, *modo et forma*.

Held, on special demurrer, that the replication was good, though the more scientific mode of replying to such a plea would have been "that the plaintiff, at the time of action brought, was the holder of the bill, *absque hoc*, that the persons mentioned in the plea were, at that time, the holders thereof."

Semble, that the plea would be bad on special demurrer, as being an argumentative denial that the plaintiff was the holder of the bill at the time of action brought.

ASSUMPSIT on a bill of exchange, drawn by defendants upon, and accepted by the directors of the Pentwyn and Golynos Iron and Coal Company, and indorsed by the

defendants to the Monmouthshire and Glamorganshire Banking Company, who sued by their registered public officer.

1841.
FRASER,
Public Officer,
&c.
v.
WELSH
and Others.

Plea. That after the bill of exchange was so indorsed to the Banking Company, and before the same became due to and before the commencement of the suit, the said Banking Company indorsed and delivered the said bill (the same being payable to order and transferrable by indorsement), upon a good and sufficient consideration to persons, to wit, certain customers of the said Banking Company, whose names are to the defendants and each of them unknown, and the defendants then became, and were, and now are liable to pay the said sum in the said bill specified to the said persons, to whom the said bill was so delivered, as in this plea aforesaid, and who, it is said, are about to take proceedings on the same bill, and who, from the time of such indorsement until, and at, and after the time when the same bill became due, and when this action was commenced, have been, and are the holders of the same bill.
Verification.

Replication. That the said persons in the plea mentioned were not, when this action was commenced, the holders of the said bill of exchange in manner and form, and as the defendants have above alleged.

Special demurrer assigning for causes, that either the replication amounts to an argumentative denial of the indorsement over of the bill by the Banking Company, and is, therefore, bad in not putting the fact in issue by a direct traverse, or it admits the indorsement, and is, therefore, bad, in not shewing a re-transfer to the Banking Company of the bill before the commencement of the suit; and the replication is bad in form for not, distinctly and clearly, shewing, whether it is meant to operate by way of confession and avoidance of the alleged indorsement, or by way of denial thereof: that it is perfectly consistent with the replication that some person, other than the said Banking Company, was, at the time of the commencement of the

1841.
FRASER,
Public Officer,
&c.
v.
WELSH
and Others.

suit, the holder of the bill, as indorsee or transferree of the same, either from the plaintiff or from the persons in the plea mentioned, as indorsees of the plaintiff: that the plaintiff ought either to have traversed the indorsement over of the bill by the said Banking Company, or admitting the same to have shewn a transfer to the Banking Company before the commencement of the action.

W. H. Watson, in support of the demurrer. The replication involves an immaterial issue: it raises the question, whether the persons mentioned in the plea were known or unknown to the defendants. If it should turn out, at the trial, that persons known to the defendants were the holders of the bill at the time of the commencement of the suit, the plaintiffs would be entitled to a verdict upon the issue raised, though they could have no right to sue upon the bill. In *Basan v. Arnold* (a), which was an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that after the bill was indorsed to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to a person unknown, and the defendant then became, and still is liable to pay the amount of the bill to the said person to whom it was indorsed, and who, from the time of the indorsement, hitherto hath been, and still is, the owner thereof: the plaintiff replied, that at the time of the commencement of the suit, the plaintiff was, and still is, the holder of the bill, without this, that any other person is the holder thereof modo et formâ; and it was held, that the replication was bad, on the ground that the only material question was, whether the plaintiff was the holder of the bill at the time of action brought. That question is not raised by this replication. It is true, that it puts in issue the fact of the indorsement, but it also raises the question, whether persons known to the defendants were the holders of the bill. In an action upon an award, if the defendant

(a) *Ante*, vol. 8, p. 356; 6 M. & W. 559.

should plead that no award was made on a particular day, and the plaintiff should reply in the terms of the plea that the award was made on that day, the issue would be immaterial.

1841.
FRASER,
Public Officer,
&c.
v.
WELSH
and Others.

Erle, contra. The declaration is founded upon the assumption that the plaintiffs were the holders of the bill at the time of the commencement of the suit: the allegation of the indorsement to them is sufficient to shew a right of action in them. The plea seeks to defeat that right by alleging that the plaintiffs indorsed the bill to persons unknown, who were the holders of it when it became due, and when the action was commenced. If, then, the plea is good, the replication is good also. The material fact upon which the defendants choose to rely is, whether or not the bill was in the hands of a person unknown, and if they have selected that question as the one by which the event of the cause is to be determined, they ought not to complain of the plaintiffs if they accept the issue tendered. In the case of *Phillips v. May* (a) this Court expressly decided, that this form of replication was good. [*Alderson, B.*—The plea

(a) That case, which was cited from the *Monthly Law Magazine*, vol 8, *Notes of Cases*, p. 27, is there reported as follows: "To a declaration by the drawer of a bill of exchange against the acceptor thereof, the defendant pleaded that the bill was indorsed by the plaintiff before the commencement of the suit, to a person to the defendant unknown, who, at the time of the commencement of the suit was the holder of the said bill: Replication, that the bill was indorsed to one R. H., who presented it to the defendant, who refused to pay it, whereupon R. H., then returned it to the plaintiff, as the

drawer thereof, who paid it, and became the holder of it, and entitled to the money specified therein. Absque hoc, that a person unknown to the defendant, at the time of the commencement of the suit, was the holder of the bill. Modo et formâ, as in the plea alleged. *Held*, on demurrer to this replication, that the special traverse was immaterial therein; the proper replication to such a plea would have been 'that the said person, in the said plea mentioned, was not the holder of the bill at the time of the commencement of the suit.' *Humfrey* for the plaintiff; *Bayley* for the defendant."

1841.
 FRASER,
 Public Officer,
 &c.
 v.
 WELSH
 and Others.

would be bad on special demurrer; it puts in issue the knowledge of the person, and that he was the holder of the bill: the substance of the plea is, that the plaintiff was not the holder of the bill at the time of action brought. Suppose it should turn out that the bill was outstanding in the hands of a third person, who was known to the defendant, which way would the verdict be?] In that case it must be found against the defendant. If the plea had alleged that the bill was in the hands of A., and it turned out to be in the hands of B., the defendant must suffer the penalty of having rested his defence upon an immaterial fact. Assuming such a plea to be good, a replication, which takes issue in the language of the plea must be good also, for it is impossible to separate the material from the immaterial part. [*Alderson*, B.—There is this difficulty in the case: the declaration states the drawing and acceptance of the bill, and the indorsement to the plaintiffs, they are the last persons who are stated on the face of the declaration to be indorseees, and thence it is inferred, that they were the holders of the bill at the time of the commencement of the suit; but it appears by the plea that there are subsequent indorseees, which fact is not denied by the replication. Now, supposing the issue found for the plaintiffs, how could they, upon the whole record, be entitled to judgment, when it is admitted by the pleadings, that a subsequent indorsee was the holder of the bill at the time of action brought?] The material fact upon which the defendants have chosen to rest their defence is, whether or no *Ignotus* was the holder the bill, that being found against them, the whole plea fails. When a plea consists of several facts, if any one of them be traversed and found against the defendant, the others are rendered immaterial. If the plea had merely stated that the plaintiff indorsed away the bill, that would have been no bar, because it might have been returned to the plaintiff after it was dishonoured; it was necessary then to go and allege, that the bill was outstanding in the hands of a third

person at the time of action brought. The material traversable fact alleged in the plea is, that Ignotus was the holder of the bill; that is denied by the replication in the only form which it could be, since it would have been improper to reply that the plaintiff was the holder of the bill.

1811.
FRASER,
Public Officer,
&c.
v.
WELSH
and Others.

Watson, in reply. The real question in the case is, whether or not the plaintiffs were the holders of the bill at the time of action brought? The plea alleges that the bill was indorsed away by the plaintiffs; the replication should either have denied that fact, or have confessed and avoided it, by shewing that the bill was returned to the plaintiffs before action brought. [*Alderson*, B.—The proper mode of replying to this plea, would have been by a special inducement, that the plaintiffs were the holders of the bill at the time of the commencement of the suit, and concluding with a special traverse, that the unknown persons were, at that time, the holders thereof]. *Burroughs v. Hodgson* (a), shews that a traverse must be so taken, that the question raised will be material and conclusive, whether found for plaintiff or defendant.

LORD ABINGER, C. B.—When the ingenuity of special pleaders is exercised in creating difficulties in the administration of justice, we must dispose of the case in such a way as seems to us right, though, at the same time, consistently with the established rules of pleading. No person, who understands the object of pleading, will ever undervalue it as a mode of administering justice; but when the invention and ingenuity of man are exerted to their utmost in making difficulties, it give to persons unacquainted with the science, but a mean opinion of its value. I am inclined to think that this replication is good. I consider the declaration as substantially stating the plaintiff to be the holder of the bill, at

(a) 9 Adol. & E. 499.

1841.
FRASER,
Public Officer,
&c.
v.
WELSH
and Others.

the time of the commencement of the suit. The declaration alleges the drawing and acceptance of the bill, that it came to the hands of the plaintiff by indorsement, and that it was afterwards dishonoured. That is a *prima facie* statement, that the plaintiff was the holder of the bill, when the action was commenced, and that the promise of the defendant was to pay *him* the amount. That being the case, the plaintiff has a clear title to recover, unless it appears that, at the time of action brought, some other person was the holder of the bill. After the bill was dishonoured, it may, perhaps, have changed hands two or three times ; but it is perfectly immaterial who was the holder, except at the time of action brought. Possibly the person who was the holder of the bill at the time it was dishonoured, may have returned it to the person from whom he received it, and so it may have come back to the hands of the plaintiff. Now, the defendant has chosen to plead a plea, alleging that an unknown person was the holder of the bill. He might have stated, that at the time of the commencement of the suit, the plaintiff was not the holder of the bill ; however, he does not think fit to do that, but alleges that the plaintiff indorsed the bill to a person unknown. The fact of the name being unknown is immaterial, provided it appears that the bill was indorsed to some other person, who was the holder at the time the action was commenced. The plea alleges that the person described as unknown, was the holder of the bill at the time of action brought, that then is the material averment. The plaintiff, in his replication, lays hold of that single fact, that the person in the plea mentioned, as a customer of the plaintiffs, was not the holder of the bill at the time of the commencement of the suit. Mr. *Watson* contends, that if at the trial it appeared that the bill was in the hands of another person whose name was known to the defendant, still the plaintiff would be entitled to a verdict, though he had no right to recover on the bill. In the first place, I am not at all clear about the truth of that proposition, for I do not think that the substance of the issue is, whether or no

the person was known to the defendant, but it is that some other person not being the plaintiff, was the holder of the bill at the time of action brought. If it be shewn that any other person was the holder of the bill, that proves the substance of the issue, inasmuch as knowledge by the defendant of the name of that person must be an unimportant fact. I do not, therefore, think that the plaintiff would be entitled to a verdict, if the defendant succeeded in proving the bill to be in the hands of a person whose name was known to the defendant. But even supposing it to be otherwise, if the defendant chooses, by his mode of stating his defence, to give the plaintiff an opportunity of traversing an immaterial fact upon which the issue may turn, it is his own fault. If a defendant sets forth many facts in his plea, any material one of which is found against him, the whole plea is disposed of. Mr. *Erle* has properly stated, that if a plaintiff, in his replication, selects one of many facts in a plea, for the purpose of trying the issue, and that particular fact is found for him, it is the same as if the other facts were struck out of the record. The question then is, whether this is a particular fact upon which the plaintiff had a right to take issue. The defendant says, that the bill was in the hands of a customer of the plaintiff, but that the customer's name was unknown to him: the plaintiff, in substance, replies, "the bill was not in the hands of any customer of mine." If the defendant chooses to put his defence upon that issue, what right has he to take advantage of his own mode of tendering it? This is not the case which has been referred to of issue joined, as to whether an award was made on the particular day alleged: there, the time of making the award was immaterial; but here, there is a material allegation, viz., that the bill was in the hands of another person at the time of action brought. I am disposed to think, that according to the strict rules of pleading, if the plaintiff had replied that "he was the holder of the bill at the time of action brought, without this, that the person mentioned in the plea as un-

1841.
 FRASER,
 Public Officer,
 &c.
 v.
 WALSH
 and Others.

1841.
FRASER,
Public Officer,
&c.
v.
WALSH
and Others.

known to the defendant, or any other person, was at that time the holder thereof," the replication would have been good. But, however that may be, the defendant has no right to object to the plaintiff taking issue in the very terms in which he has tendered it.

ALDERSON, B.—I am of the same opinion, and think the replication good. In truth this case is governed by *Phillips v. May*: there the Court gave judgment against the plaintiff because the inducement to the traverse was bad, not on the ground that the traverse itself was defective. If the defendant chooses to state in his plea the fact that there has been an indorsement of the bill to a person unknown, who is the holder thereof, the plaintiff may reasonably traverse the fact in the terms in which the defendant has alleged it. It seems to me to make no difference whether the person was known or not, the material averment is, that the person stated to be unknown was the holder of the bill at the time of action brought. If there be any inconvenience arising to the defendant from raising an issue as to the knowledge of the person holding the bill, it is his own fault. But it seems to me to make no difference whether the person was, or was not known to the defendant. If he had named, in his plea, A. B., and the plaintiff had denied that A. B. was the holder of the bill, and it had turned out that C. D., or some one else was, then the defendant would have altogether failed. Certainly the more scientific mode of replication would have been that suggested by the Chief Baron, namely, by stating, by way of inducement, that the plaintiff, at the time of action brought, was the holder of the bill, and concluding with a special traverse, that the person mentioned in the plea was the holder thereof. If the replication had simply alleged that the plaintiff was the holder of the bill, that would have been an argumentative denial that the unknown person was the holder. To meet a difficulty of this description the ancient pleaders adopted the form of a special traverse, in which they stated the affirmative

matter by way of inducement, and added the negative in the words of the plea. This replication is, in substance, the same, and the objection as to its form cannot be taken advantage of on this demurrer.

GURNEY, B.—I am of the same opinion.

ROLFE, B.—The substance of the plea is that the plaintiff indorsed away the bill, and that it is outstanding in the hands of a third person. The question then is, whether or not the bill was outstanding at the time the plaintiff commenced his suit? The plaintiff takes issue upon that which is a substantial part of the defence. I agree with the argument of Mr. *Erle*, that if one material fact is found against the defendant, the defence altogether fails.

Judgment for the Plaintiff.

COTTON v. GODWIN.

ASSUMPSIT by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.* payable on demand. The declaration averred a demand.

Plea. As to 3*l.* parcel, &c., a set-off for money paid by the defendant for the plaintiff, and due at the time payment of the note was demanded, and ever since. Verification. And as to 12*l.* 9*s.* 4*d.* residue, &c., that at the time of the said demand, the defendant tendered to the plaintiff the sum of 12*l.* 9*s.* 4*d.*, and that he hath always from the time of the making of his said promise as to 12*l.* 9*s.* 4*d.* residue, &c., been ready and willing to pay that sum, and now brings the same into Court, &c. Verification.

off, at the time of the commencement of the suit; as to the second plea, that before the making of the tender, the sum of 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.* was due upon the note, which sum the plaintiff demanded, but the defendant refused to pay the same, and that no set-off or other just cause existed for the non-payment.

Held, that the replication was good.

D D D 2

1841.
FRASER,
Public Officer,
&c.
v.
WALSH
and Others.

To an action by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.* payable on demand; the defendant pleaded as to 3*l.*, parcel, &c. a set-off, at the time of demand. And as to 12*l.* 9*s.* 4*d.* residue, &c., a tender of that sum, at the time of demand. Replication to the first plea denied the set-

1841.

COTTON
v.
GODWIN.

Replication. First, a denial of set-off, at the time of the commencement of the suit, upon which issue was joined. Secondly, that before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.*, was due, upon and by virtue of the said promissory note, and that before the said tender, to wit, on, &c., the plaintiff demanded payment of the said sum of 15*l.* 9*s.* 4*d.* which so then included the said sum of 12*l.* 9*s.* 4*d.* yet the defendant did not then pay the said sum of 15*l.* 9*s.* 4*d.*, or any part thereof, but then wholly neglected and refused to pay the said sum of 15*l.* 9*s.* 4*d.* and every part thereof, and that no set-off or other just cause existed for the non-payment of the said sum of 15*l.* 9*s.* 4*d.*, or any part thereof.

Special demurrer, assigning for causes, that the plea is informal, inasmuch as it sets up a demand of a greater sum than the tender: and also that the plea is bad for duplicity.

Wightman, in support of the demurrer. The replication is bad as an answer to the plea of tender, for it neither denies, nor confesses or avoids it, but sets up a prior demand of a larger sum than that tendered. It should have shewn a prior demand of the precise sum tendered, *Rivers v. Griffith* (a). A replication to a plea of tender of a subsequent demand and refusal, would not be supported by proof of a demand of a larger sum than that tendered, *Spybey v. Hide* (b). Secondly, the replication is double. The pleas taken together constitute but one answer to the whole declaration, but the plaintiff first denies the set-off, and then alleges that the amount sought to be set-off, was due, and demanded by him, together with the sum tendered, and by that means has the benefit of two answers to the plea, either of which would have been sufficient.

(a) 5 B. & Ad. 630; 1 D. & R. 215.

(b) 1 Camb. 181.

Cole, contra. *Rivers v. Griffiths* only decides that a replication of a prior demand of the sum tendered is not supported by proof of a demand of a different sum. Here, the cause of action accrued on the demand of payment of the note. If no demand was in fact made, the defendant might have traversed that allegation; but the plea admits a demand, consequently a tender, after the time for payment, could not be a good plea, though of the whole money due upon the note, *Hume v. Peploe* (a). Secondly; though the pleas constitute but one answer to the whole demand, yet they are distinct pleas as to the portion to which they are pleaded.

1841.
COTTON
v.
GODWIN.

Wightman replied, and contended that the replication to the first plea should have denied a set-off at the time of demand.

On the suggestion of the Court that both parties should amend, the case stood over. The plaintiff not consenting to amend, the judgment of the Court was, in a subsequent term, delivered by

PARKE, B.—This case stood over for counsel on both sides to consider whether the pleadings should be amended. It has since been intimated to us that the plaintiff wished the opinion of the Court upon the pleadings as they stand. We have considered the case, and are of opinion that the plaintiff is entitled to judgment. (His Lordship stated the pleadings.) The replication to the plea of set-off is correct, though it takes no notice of the averment that the sum claimed by the defendant was due at the time of the demand mentioned in the declaration, that fact was wholly immaterial on a simple plea of set-off, where the defence is merely the existence of a cross demand. It is, however, unnecessary to advert to that point as the replication to the first plea is not demurred to. With respect to the second plea,

(a) 8 East, 168.

1841.

COTTON

v.

GODWIN.

it is unnecessary to decide whether or no a plea of tender of part of an entire sum due on a promissory note is good, without shewing, in some way, that nothing more was, at that time due, as we are clearly of opinion that the replication to that plea is good. The principle upon which a plea of tender proceeds is, that the defendant has performed so far as he could perform his part of the contract, by being always ready to pay the debt, and actually offering to do it; but this replication shews that there was a time when the defendant was not ready to perform his part, *viz.* when the demand was made of the whole amount of the note, at which time he ought to have been ready to pay the whole, as the whole was then due, according to the averments in the replication which must be taken to be true on this demurrer. That being so, a subsequent tender of part was unavailing. Our judgment must, therefore, be for the plaintiff.

Judgment for the Plaintiff.

*See Jackson v. The Mid. Railway Comp: 4. Exch: 307.
Barnes v. Marshall. 2. L. Q. B. 300*

PICKFORD v. THE GRAND JUNCTION RAILWAY COMPANY.

Reported in M. & N. 873. 2. L. Q. B. 342.

In a declaration against a common carrier for refusing to carry goods it is not necessary to aver a tender of money for the carriage, but it is sufficient to allege a readiness and willingness, and offer to pay.

THE declaration stated that the defendants were common carriers of goods and chattels for hire from Liverpool to Birmingham, and that the plaintiff caused to be tendered to the defendants, being such carriers, a certain package containing goods not exceeding a certain weight to be carried and conveyed by the defendants from Liverpool to Birmingham for certain reasonable hire and reward to them in that behalf: that although the plaintiff was then ready and willing and offered to pay the defendants a reasonable sum for the carriage of the said package, whereof the defendants had notice; yet the defendants, not regarding their duty as such carriers, refused to carry or convey the same.

Special demurrer, on the ground that the declaration should have alleged an actual tender of the charges for the carriage of the goods.

Cowling, in support of the demurrer. The declaration should have averred a tender. By the common law, tradesmen in general may choose with whom they will deal, but it is different with respect to carriers and innkeepers, the former must carry, and the latter receive their guests. It is then only reasonable that a party seeking to make them liable for a breach of duty in that respect should show that he has paid or tendered the reasonable charges. In *Pinchon's* case (a) it is said, "if a victualler or common hostler bringeth an action of debt for the victuals delivered to his guest the guest may wage his law; for a victualler or hostler is not compellable to deliver victuals till he be paid for them in hand, and therewith agrees 10 Hen. 7-8 a." So in *Hawkins' Pleas of the Crown*, Book 1, c. 32, s. 2, it is said, "if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but may also be indicted and fined at the suit of the king." In *Jackson v. Rogers*, (b) which was an action against a common carrier for refusing to carry goods, the Court say, "that the action is maintainable as well as it is against an innkeeper for refusing guests, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. In *Story on Bailments*, c. 6, s. 508, it is stated to be "one of the duties of a common carrier to receive and carry all goods offered for transportation upon receiving a suitable hire. This is the result of his public employment as a carrier; and by the custom of the realm, if he will not carry goods for a reasonable compensation, upon a tender of it, and a refusal of the goods, he will be liable to an action, unless there is a reasonable ground for the refusal." A ferryman is not obliged to carry unless the money is tendered him. [*Parke*, B.—Is there not a distinction between the case of a ferryman and a carrier, the former

1841.
 PICKFORD
 v.
 The Grand
 Junction
 RAILWAY Co.

(a) 9 Co. 87 b.

(b) 1 Show. 327 ; 1 Wms. Saund. 312, N. 2, c.

1841.
 PICKFORD
 v.
 The Grand
 Junction
 RAILWAY Co.

cannot have a lien upon the man carried.] In *Rushforth v. Hadfield*, (a) it was decided that a carrier had no general lien, but only for the carriage of the particular goods.

Martin, in support of the declaration. The averment that the plaintiff was ready and willing, and offered to pay, is sufficient without alleging an actual tender. It does not appear, from the report of *Jackson v. Rogers*, that there was an actual tender of the money, it is only said that the carrier was offered his hire. The authority quoted for the position in *Story on Bailments*, is *Bacon's Abridgment, Carriers*, (B), where the word "offered" is made use of, and it is evident that the word "tender" is not used in its strict sense, either in *Williams's Saunders*, or in the passage cited from *Hawkins' Pleas of the Crown*, but as synonymous with "offer." Where by the terms of a contract, the one party is to pay money upon the performance of some act by the other, the former may maintain an action for the breach of contract without making an actual tender. Thus, in an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of the sale, without averring an actual tender of the price, *Rawson v. Johnson*, (b) *Wilks v. Atkinson*, (c) *Levy v. Herbert*, (d) *Waterhouse v. Skinner*, (e) are authorities to the same effect. The law casts upon a carrier the duty of carrying the goods, and he must rely upon his lien as a security for the payment of the carriage.

Cowling replied.

Cur. adv. vult.

(a) 7 East, 224.
 (b) 1 East, 203.
 (c) 1 Marsh. 413.

(d) 1 Moore, 56; 7 Taunt. 314.
 (e) 2 B. & P. 447.

1841.

PICKFORD

v.

The Grand
Junction
RAILWAY Co.

PARKE, B. delivered the judgment of the Court.—This was an action against the Grand Junction Railway Company for refusing to carry certain goods. The declaration alleged that the defendants were common carriers for hire, &c. (His Lordship read the declaration.) To this there was a demurrer, on the ground that there was no averment of a tender of any money for the carriage of the goods. Both parties admit that the defendants are bound in their character of common carriers to carry goods; but it is contended, on one side, that they are not bound to carry, except for ready money. There is no doubt a person may maintain an action against a carrier for refusing to carry; but then the question is, whether it is necessary to allege in the declaration a strict tender, or whether it is not enough to aver a readiness and willingness, and offer to pay? The Court have considered the question, and are of opinion that this is not like a tender which is applicable only to the case of a previous duty imposed upon the party tendering the money. A tender is, in truth, a payment so far as the debtor is concerned, for he can do no more, unless the creditor will receive the money. In that sense, no tender is required in the present case. Here, are contemporaneous acts: and, according to the authority of *Rawson v. Johnson*, it is sufficient in that case to be ready and willing to pay the money when the other party is ready and willing to do the contemporaneous act. We, therefore, think this averment in the declaration sufficient, and that the plaintiff is entitled to judgment, but the defendants may have liberty to amend on payment of costs.

Judgment for the Plaintiff.

1841.

COY v. Lord FORRESTER.

The defendant having pleaded not guilty, "by statute," the Court, upon affidavit that the plaintiff could not discover the statute, ordered the defendant to point it out, or that the words "by statute," be struck out of the margin of the plea.

THIS was an action of trespass for hunting over the plaintiff's land. The defendant having pleaded not guilty "by statute,"

Whitehurst had obtained a rule, calling on the defendant to shew cause why he should not state to the plaintiff the particular statute under which the plea was pleaded, or else why the words "by statute" should not be struck out of the margin of the plea. He moved, on an affidavit, that the plaintiff was unable to discover the particular statute under which the defendant intended to justify.

Bovill shewed cause.

PER CURIAM.—The defendant must point out the statute upon which he relies, within three days, or the words "by statute" will be struck out of the margin of the plea.

Rule absolute accordingly.

SHARP v. KEY.

An execution creditor under an elegit, is not entitled to rent which became due between the time of the delivery of the writ to the sheriff, and the taking of the inquisition.

COVENANT on an indenture of lease by lessor against assignee of lessee for one quarter's rent, due 29th September, 1840.

The plea, in substance, stated that before the rent became due, one W. Sage, in the Court of Exchequer, recovered a judgment against the plaintiff for a certain debt and damages; that the debt and damages remaining unsatisfied, W. Sage, before the rent became in arrear for obtaining satisfaction, sued out a writ of elegit, and delivered it to the sheriff of Middlesex, indorsed to levy 27*l.* 16*s.*; that W. Sage then gave notice to defendant to pay all future sums

of the rent to accrue and become due to him, W. Sage. By virtue of which writ of elegit afterwards, a certain inquisition was had and taken at the sheriff's office, to wit, on the 16th October, 1840, and by adjournment on the 23d day of October, 1840, by which inquisition it was found that the plaintiff, on the 3rd July, 1838, was seised in his demesne as of fee of and in certain premises, &c.; that these premises, with their appurtenances, the sheriff caused to be delivered to W. Sage, to hold until the debt and interest should be levied; that the premises are the same as in the indenture in the declaration mentioned, and the judgment was in full force, and the debt and damages unpaid at the time when the rent aforesaid became due, and at the time of the commencement of the suit; and W. Sage, by means of the premises, thereby then became and was entitled to demand of and from the defendant the said rent, and, therefore, before the commencement of the suit demanded and claimed the same. Verification.

1841.

SHARP

v.
KEY.

Special demurrer, assigning for causes that the delivery of the premises under the writ and inquisition are a symbolical and not an actual delivery; and it does not appear in the plea that W. Sage evicted or ejected the defendant, without which he was not of right entitled to receive the rents; nor is it stated that defendant, before the rent accrued due, attorned to W. Sage; that it does not appear that the rent was due after the taking of the inquisition, or after the delivery of the premises to W. Sage; that it does not appear what the nature of the plaintiff's estate was, or whether the sum was capable of being extended under an elegit; that it is not averred that the defendant paid the rent to W. Sage.

Cresswell, in support of the demurrer, was stopped by the Court.

Bramwell, in support of the plea. It appears upon the pleadings, that the writ of elegit was delivered to the sheriff

1841.

SHARP
v.
KEY.

before the rent became due; but the inquisition was not taken until after. The question then is, whether the inquisition had relation back to the time of the delivery of the writ to the sheriff, so as to entitle the execution creditor to the rent?

PARK, B.—The rent in arrear is no part of the reversion; it is a mere chose in action. Have you found any authority to shew that the execution creditor is entitled to it?

Bramwell admitted that there was no authority in point, whereupon the Court gave

Judgment for the Plaintiff.

The ATTORNEY GENERAL v. Lord CHURCHILL.

The Crown has no prerogative right in an information of intrusion, to lay the venue in any county, or to issue a venire facias juratores into a different county from that in which the venue is laid.

THIS was an information of intrusion for encroachments on certain crown lands in the Forest of Wychwood, in the county of Oxford. The venue was laid in Oxfordshire.

The *Attorney General* moved that the venire facias juratores might issue into the county of Hertford instead of the county of Oxford. He referred to the *Attorney General v. Parsons* (a) as an authority to shew that the Crown, by its prerogative, might lay the venue in any county, and if laid in a particular county might have an inquisition in another county. The Court, upon referring to that case, made an order absolute accordingly.

Sir *W. Follett*, on a subsequent day, obtained a rule nisi to rescind that order, and to try the cause by a jury from the county of Oxford, where the venue was laid, against which

(a) *Ante*, vol. 5, p. 165; 2 M. & W. 23.

The *Attorney General*, the *Solicitor General*, *R. V. Richards*, and *W. J. Alexander*, shewed cause. The Crown has a right to lay the venue in any county, or when laid in a particular county it may have the inquisition in another county. It is true that as between subject and subject the action would be in its nature local, but the Crown possesses many privileges, both in the commencement and progress of a suit, which do not belong to the subject. The Crown may choose its Court; the subject can bring a real action only in the Court of Common Pleas; a writ of right or a quare impedit may be brought by the Crown either in the Court of Queen's Bench or Exchequer. At common law, a subject could plead but one defence, while the Crown was always at liberty to plead several matters. Even at present, the subject is limited to a single replication to each plea, but the Crown may reply several matters. The subject cannot amend without leave of the Court; the Crown may amend at any time. In a suit between subject and subject, if one party demurs, the other must join in demurrer; but in such a case, the Crown may renounce the demurrer and join issue between subject and subject: there can only be a trial at bar by leave of the Court; but the Crown may claim it de jure. During the trial, also, the Crown possesses privileges which do not belong to the subject. The Attorney General is entitled to reply, both in civil and criminal proceedings, although no evidence be offered on the part of the defendant (a). So, also, the Attorney General may withdraw the record after the jury are sworn and the trial has proceeded (b). Such privileges are more im-

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) The *Attorney General* stated that it had been decided by the judges upon the prisoners' counsel bill, that even in cases of capital felony, the *Attorney General* had a right to reply, though no evidence was called for the prisoner.

(b) The *Attorney General* mentioned instances of this privilege

having been exercised by Sir *Samuel Shepherd*, and the present Lord Chief Justice of the Queen's Bench, when Attorney General; whereupon Mr. Baron *Parke*, observed, that he never heard that the power of the Attorney General to withdraw the record was disputed.

1841.

The
ATTORNEY
GENERAL
v.
Lord
CHURCHILL.

portant and more liable to abuse than the one now contended for. It is unnecessary to inquire whether this privilege belongs to the Crown in *real* actions: but it is contended that it exists in all *personal* actions, and that an information of intrusion is a *personal* action. In *Manning's Exchequer Practice* (a), it is said, "An information of intrusion is a proceeding which, though answering the purpose of a real action, is said to be in the nature of an action of trespass quare clausum fregit for the King, in respect of a trespass committed against his lands and possession, as by entering them without title, holding over after a Crown lease is determined, taking the profits, cutting down timber, and the like." And in section 2, it is said, "the King may lay his venue in any county without regard to the local situation of the premises." Again, in *Comyn's Digest* tit. *Prerogative* (D 85), it is said the King by his prerogative may lay his action in what county he pleases;" and in the same book, *Debt* (G 12), "In all personal actions, the King may lay the venue in what county he pleases." The *King v. Webb* (b) is an authority to shew, that having laid it in a particular county, he may of right change it to another county. There, in an action for embezzling the King's goods, which was laid in the declaration to be in London, it was moved for the King that the county might be changed; and the Court held that the King might choose his Courts, and might waive that which he seemed to have elected before, as he may waive his demurrer and join issue, and *contrà*. In the report of the same case, in 1 *Siderfin*, 412, the Court is made to say, "the King has the prerogative to try his personal actions where he pleases;" and it will, perhaps, be contended on the other side, that the term "personal actions" means "transitory actions;" but if that were so, the point would never have arisen, for in the latter species of action the subject has a right to lay the venue where he pleases, and of course the Crown might do the same. The decision must apply to something

(a) Chap. 2, s. 1.

(b) Vent. 17.

which the Crown might do, and which could not be done by the subject. Personal actions are opposed to real actions; local, to transitory actions. Upon reference to the records of this Court, it will be found that whenever the Attorney General has moved for leave to issue a venire into a different county from that in which the venue was laid, it has been invariably inserted upon the record, that it belongs to the Crown to try the cause where it pleases in personal actions. Thus in the Order Book of this Court, Easter Term, 53 Geo. 3, there is the following entry: "*Rex v. Penny*, sci. fa., under an extent, venue Suffolk, changed to Middlesex;" and the form in which that is done is thus, "His Majesty's Attorney General prays may be inquired of by the Court, and the said John Penny doth the like. Issue is joined, and his Majesty's Attorney General being present here in Court in his proper person, states to the Court here that it is the prerogative of his said Majesty that all inquisitions in personal suits instituted in this Court for and on behalf of his said Majesty be taken in any county within that part of the United Kingdom of Great Britain and Ireland called England, and prays that an inquisition in the premises may be taken in the county of Middlesex, which is ordered by the Court accordingly." There is a similar entry of Suffolk changed to Middlesex in Trinity Term, 4 Geo. 3, *The King v. Tyers*, that was also scire facias under an extent, and there was the like suggestion by the Attorney General. Then in Michaelmas Term, 55 Geo. 3, Essex changed to Middlesex, in *The King v. Stake*. Again, in Michaelmas Term, 25 Geo. 3, Essex changed to Middlesex, *The King v. Leicester*, and the *King v. Grimwood*. In *The King v. Ogle*, Michaelmas Term, 48 Geo. 3, Lancashire was changed to Middlesex: that case is important, because it was an extent, under which real property in Lancashire was seized. It is laid down in *Plowden*, 321 (The case of Mines) that the precedents and records of the Exchequer are to be taken as the most substantial proofs of the law of

1841.

The
ATTORNEY
GENERAL
v.
Lord
CHURCHILL.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

the land. The same question has arisen with respect to penal actions, but though such actions between subject and subject are local by statute, yet the crown suing for penalties may lay the venue or try where it pleases, 4 *Inst.*, 1721, 1 *Saund.* 312, b. n., 2 *Sty.* 479. Secondly. An information of intrusion is a personal action: it is an action of trespass quare clausum fregit, at the suit of the Crown. No writ issues to the sheriff to give the Crown possession, but the Court impose a fine upon the wrong doer. In *Blackstone's Commentaries*, after describing the different forms of actions, (a) it is said, (b) that "an information on behalf of the Crown filed in the Exchequer by the King's Attorney General is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the Crown." In *Viner's Abridgment*, tit. *Prerogative*, F. e. 3, pl. 2, it is thus laid down, "Information of intrusion was for intruding into a certain portion of tithes of the rectory of D., in the county of Lancaster: the defendant pleaded non-intrusit, whereupon a commission was prayed to examine witnesses who are not able to come to the Court, but *Manwood* denied it, for this information is to prove a title to the Queen, and it is in the nature of an inquisition, and is not to try the right; but had it been to try the title of the defendant upon a bill whereto the defendant had answered, and that they had proceeded to issue, then he might either join in commission or have commission alone." Also at pl. 10, it is said, "Information of intrusion is not real, but personal, and to be resembled in all points to trespass, for it supposed the King in possession, as action of trespass supposes a subject, and the land is not demanded nor recoverable, but damages only, as in trespass, and the defendant is to be fined si convincatur de intrusione, as in trespass, if he be found guilty of entry vi et armis. In *Perrot's* case, (c) and in *Friend v. Duke of*

(a) Vol. 3, p. 117.

(b) p. 261.

(c) Moore, 375.

Richmond, (a) the same doctrine is laid down. In *Saville's Reports* (b) upon a conference of the Barons on errors assigned in a case of intrusion, *Manwood*, Chief Baron, is reported to have said, "that the general informations for intrusion in certain lands and tenements are as good as trespass quare clausum fregit, which is used in trespass at common law, which do not express any certain quality of lands." In the case of *Mines*, (c) which occurred in the 10 Eliz., and which was an information exhibited by the Queen's Attorney General against the Earl of Northumberland, touching a mine of copper containing gold or silver claimed by the Queen, an exception was taken to the information, "because it was not shewn in what town or hamlet Newlands lay, so that if the defendant had pleaded not guilty, it was uncertain from whence the venue should come. But all the justices and barons agreed that the information was good, because it is but in effect for a trespass for which the Queen shall recover only damages: but if it had been an action real, then it ought to have been shewn in what town or place the land was, for otherwise the sheriff could not know where to put the party in seisin if he recovered." Again, in *Walshingham's* case (d) it is said, "It appears to be the practice of the Exchequer, that when a man is convicted in the Exchequer of an intrusion into any lands of the Crown upon a bill of intrusion there exhibited, where the title of the Crown appears to be good, and the title of the party to be insufficient, although such suit is but a personal suit, and in effect nothing more than a trespass, yet the party shall be removed and put out of possession by a writ framed in the case." [*Parke*, B. That is, to turn the party out of possession, not to put the Crown in.] The Crown cannot be disseised, and in contemplation of law is always in possession. If the decision in the present case should be in favour of the Crown, and the defendant still continued in possession, there would be no difficulty in

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) *Hardress*, 460.(c) *Plow.* 337.(b) *P.* 45.(d) *Plow.* 567.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

framing a writ to meet the case, reciting the information, the trial in the county of Hertford, the verdict and judgment, and that the defendant still trespassed on the possession of the Crown; and the writ would go as a matter of course to the sheriff of the county of Oxford. The privilege contended for is not confined to personal actions; there are instances in which it has been adjudged to belong to the Crown in criminal proceedings. In an information against the county of Wilts for not repairing a bridge, the Court held that the Attorney General might take a *venire facias* to any adjoining county, and that it might be *de corpore* of the whole, or *de vicineto* of some particular part therein next adjoining." *Rex v. The Inhabitants of Wilts* (a). That was an information against the county, and equally local in its nature as an information of intrusion. There is also authority that this privilege belongs to the Crown in real actions. In *Bulwar's* case (b) it is thus laid down:—"Writs of *quare impedit* and *quare incumbravit* shall be always brought where the church is" (that is, between subject and subject), "for by the one the plaintiff shall recover his presentment, and by the other the bishop's clerk shall be removed and the plaintiff's clerk admitted; and so it is said to have been decided in 4 Ed. 3, fol. 9, otherwise it is in the King's case." Also in *Bacon's Abridgment*, tit. "*Prerogative*," (E 7), it is said to be "a rule of common law that the King, by his prerogative, may sue in what court he pleases, and therefore may bring a writ of right, or a *quare impedit* in the King's Bench. In *Comyn's Digest*, tit. "*Action*" (N 4), 3, this is recognised as law, and it is said that "a *quare impedit* shall always be brought where the church is, except in the case of the King." *Lester v. Edwards* (c), though cited on the other side, has been interpreted by all the writers on the subject as an authority, to shew that the Crown may not only choose its court, but also its county. That was an ejectment for lands

(a) 3 Salk. 381.

(b) 7 Co. 3.

(c) Savile, 9, 10.

in Wales, and the question was, whether an officer of the Court of Exchequer had the privilege of bringing an action in the county of Salop? *Manwood*, J., says, "He cannot have privilege for lands in Wales, because they are to be tried in the county where the land lies, by statute 34 Hen. 8;" and *Shute*, J., says, "if the Queen were a party 'sert try ici,' which shews that the Queen had a different privilege from that claimed by the officer of the Court. It is contended, on the other side, that the word "ici" means, "here, in this Court;" but the question was not as to the Court, but in what county the trial should take place, and it would be useless to say that the Queen might sue in her Court of Exchequer. The word "ici" means England, that is, in an English county, in contradistinction to a Welsh county. [*Alderson*, B.—Can you find the clause in the 34 Hen. 8, which binds parties to try their cases in Wales?] It does not appear to be on the statute-book, and the origin of the custom rests in great obscurity. Lord *Ellenborough*, in *Goodright v. Williams* (a), says, "Whether the practice originated in the common law, or from some Act of Parliament, which is not now extant, according to the opinion of Lord Chief Justice *Vaughan* (b), it is so uniform that it may well be referred to one or the other." [*Alderson*, B.—Very likely the difficulty may be solved by the 27 Hen. 8, c. 26, by which there was a power given to commissioners to fix places to which causes were to be taken: it is probable the places fixed were Salop and Hereford. One clause in that Act gave to the King's commissioners power to issue a commission to try real actions in the county of Monmouth, which, possibly, may have induced the Courts to think that they could not try for the rest of Wales, that not being in the Act of Parliament.] However that may be, the case of *Lester v. Edwards* shews, that though the subject could not at that time bring ejectment for lands in Wales to be tried in the next adjoining county, yet the Queen might.

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) 2 M. & Sel. 274.

(b) *Vaughan*, Rep. 217.

1841.

The
ATTORNEY
GENERAL
v.
Lord
CHURCHILL.

Another case relied upon by the other side is, *The Queen v. Lord Vaux* (a), which was an information of intrusion for entering into the rectory of Ethelborough, in the county of Northampton, and for taking lands and sheep at Westminster, in the county of Middlesex, and the question was, whether a sufficient title had been made out? And the Court say that "the bill of intrusion is but in the nature of a possessory action, as an action of trespass, in which case it is sufficient to make title to the possession only, without relying upon the right," and they gave judgment for the Crown. Upon that, a writ of error was brought (b), and the error assigned was, that the bill was exhibited for taking goods of the Queen at Westminster, in the county of Middlesex, and for intruding into the rectory of Ethelborough, in the county of Northampton, whereas the Queen ought to have brought several bills, being but several causes of action arising within several counties, but it was resolved by the whole Court that the bill of the Queen was good enough; and they say that if the defendant will plead not guilty, then several writs of venire facias shall be awarded, one into Middlesex and the other into Northampton. *Rowe v. Brenton* (c), has been also referred to, but the report of that case contains no statement as to the ground upon which the venire was awarded into the county of Hertford; but it appears, upon inquiry, that it was done by agreement between the parties. There is a record of a case which occurred in the 7 Eliz. which may, at first sight, appear to be an authority against the present application, the *Attorney General v. Gerrard*: it was an information of intrusion, by the Attorney General, for lands in the county of Durham; the defendants made title under the Bishop of Durham; issue was joined upon a traverse of that, and then comes the following entry:—"And because it is witnessed here in Court, by the relation of the aforesaid Attorney General of the now Lady the Queen, that all the free tenants

(a) 1 Leon. 37.

(c) 3 M. & R. 133; 8 B. & C. 737.

(b) 4 Leon. 26.

within the bishoprick of Durham aforesaid, held of the aforesaid bishop in capite, either immediately or mediately, so that the issue aforesaid to the county there cannot be indifferently tried, therefore it is agreed, by the consent and assent of the said defendants, that it be commanded of the sheriff of York that he cause to come here," &c. The words in the original were, "ideo concordatum est assensu et consensu," which amounts to no more than this, that the parties agreed upon the county. (a) There is an entry of Michaelmas Term, 3 Wm. 3 (b), which is strong evidence

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) ALDERSON, B., observed that it might be a question whether the Queen's prerogative extended to a place where there were jura regalia.

Attorney General. I know that when I go upon a special retainer, my learned friend, Serjt. *Atcherly* says, that the Queen's Attorney General has no precedence of the Attorney General of the Duchy, and to obviate all difficulty, I now take care to have a special command from her Majesty, for the Assizes, that her Majesty's Attorney General should have precedence over that officer of the Duchy.

ALDERSON, B.—The Attorney General of Lancaster used to claim precedence over the King's Attorney General.

Attorney General.—Yes! and, whatever precedence the Attorney General of any county palatine would have, would belong to the Attorney General of the county palatine of Durham, because, immemorially, the bishop of Durham was a prince, and had

jura regalia within the bishoprick.

(b) The entry is thus:—"Michaelmas, 18 Nov. 8 Wm. 3." In the margin, there is "Michaelmas—Montgomery." The title of the cause is, "Between the Attorney General of our lord, the King, informant, the most noble, Henry, Duke of Beaufort, and others, defendants, about the seizure of lands in the county of Montgomery, late the lands of William, Marquis of Powis. Upon the motion of Mr. *Browne*, of counsel, with the defendant's informing the Court that the cause is appointed to be tried at the bar of this Court, upon Friday next, come sen'night, and praying that a special jury may be returned by the deputy remembrancer, for the trial of this cause, and hearing Sir Thomas Trevor, Knight, his Majesty's Attorney General, on behalf of his Majesty, it is ordered by the Court that the under-sheriff of the county of Middlesex, do attend. Mr. Baron *Powis*, with his book of freeholders' names, who is desired to take out forty-eight names, whereof each side are to strike out

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

of the right claimed, though the record to which it refers cannot be found. That case was either a real action or an information, and though the venue was laid in the county of Montgomery, a venire was awarded into the county of Middlesex, which must have been done upon the prayer of the Attorney General. *The Attorney General v. Parsons* (a), which was decided upon consideration and after consulting the authorities, is conclusive in support of the right claimed. [Parke, B.—The Court proceeded upon the authority of the extract from brother Manning's *Exchequer Practice*]

Sir W. Follett, Manning, Serjt., Whately, and Robinson, in support of the rule. The Attorney General has no right, by virtue of the prerogative of the Crown, to direct the venire to be issued into the county of Hertford. The statements in books of practice are not sufficient to establish such a prerogative; but it ought to be clearly proved by usage. *Rex v. Mann* (b). The only authority which can be found in support of it is, the *Attorney General v. Parsons*, but that case was decided upon the passage cited from Manning's *Exchequer Practice*, and it does not appear that the case of *Lester v. Edwards*, which is there referred to, was brought under the consideration of the Court. In *The Attorney General v. Ferrard*, the venue was changed, upon the special grounds, that the freeholders held in capite of the Bishop of Durham, and that a fair trial could not be had in the county. That case is referred to in a manuscript book of practice of this Court, by Mr. Jocelyn, one of the clerks of the Court in 1758 (c), where it is said, "In some special cases a venire facias may be of another county, by consent; as, where an information of intrusion was exhibited against the Bishop of Durham for lands in that

twelve, and the remaining twenty-four are to be returned by the sheriff for the trial of the said cause. *Bathurst* for defendants."

(a) 2 M. & W. 23; *Ante*, vol. 5,

p. 165.

(b) 2 Stra. 786.

(c) This book was stated to be in the custody of Mr. Wood, one of the officers of the Court.

county, after issue joined, for that it was suggested that all the freeholders of that county did hold immediately or mediately of the bishop; it was ordered, by consent, that the venire facias should be made to the sheriff of the county of York, from the body of that county." There is no authority or dicta that this prerogative exists in actions for injury to real property; and in all the cases in which it is stated to exist with reference to "personal actions," it will be found that the dicta refer to "transitory actions" for injury to personal chattels or to debt. It is very improbable that such a prerogative should exist, for formerly the jury were summoned from the neighbourhood, not as judges only, but as witnesses. Not a trace of such a prerogative is to be found either in Chief Baron *Gilbert's Treatise*, or in *Burton's Practice of the Exchequer*. *Manning's Practice* is the first book in which any mention is made of it, and the proposition there laid down rests entirely upon a misunderstanding of the case of *Lester v. Edwards* (a). The passage cited from *Comyn's Digest*, tit. "Prerogative," (D 85,) only shews the Crown may sue in what Court it pleases, and in personal actions, may have a venire in any county, but in actions for injury to real property it can only have a venire in the county in which the land lies. It is argued, that if the term "personal actions" meant only transitory actions, there would be no difference in this respect between the subject and the Crown; but that is not so. Before the statute of Richard 2, all actions, whether for injuries to real property or otherwise, were transitory, that statute required them to be brought in the county in which the cause of action arose. In *Tidd's Prac.* 650, it is said, "The law having settled the difference between local and transitory actions, it seems, that towards the reign of Richard the Second, it was greatly abused, for a litigious plaintiff would frequently lay his action in a foreign county, at a great distance from where the cause of it arose, and

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) Saville, 9, 10.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by statute, to the intent that writs of debt and account, and all other such actions, be from henceforth taken in their counties, and directed to the sheriff of the counties where the contracts of the same actions did arise; that if, from henceforth, in pleas upon the same writs, it shall be declared that the contract thereof was made in another county than is contained in the original writ, that then the same writ shall be utterly abated. Soon after the statute of Henry 4, a practice began of pleading in abatement of the writ, the impropriety of its venue, even before the plaintiff had declared. At first, in the reign of Henry 5, they examined the plaintiff upon oath as to the truth of his venire. But soon after, they began to allow the defendant to traverse the venue, and try the traverse by the country. This practice being subject to much delay, the judges introduced the present method of changing the venue, upon motion, on the equity of the above statute, which, Lord *Holt* says, began in the time of James 1." The statute of Richard 2 not binding the Crown, it may, in transitory or personal actions, lay the venue in any county, and the defendant cannot remove it on the ground that the cause of action arose in another county. That such is the prerogative set up in the case of *The King v. Webb*, and referred to in *Com. Dig.* tit. "*Prerogative*," (D 85), *Dett.* (G 12), is evident from the report of the same case in *Siderfin*. That report uses the words "personal action," which are not found in the report in *Ventris*, which differs in other respects, and it would seem that the former is the more correct. Then it is said, that an information of intrusion, being in the nature of a personal action, the same rule applies. But that case turned upon the question, whether the Crown was bound by the statute of Richard 2, which makes a distinction between "transitory" and "local" actions, not between "personal" and "real." The cases referred to as authorities that the Crown has this prerogative in penal

actions, merely shew that the Crown is not bound by the statute which makes penal actions local. In *The Attorney General v. Hines* (a), it was decided that any offence against a statute was transitory in its own nature, and that the King's prerogative or right to lay his information in any county, would not be taken away without express negative words. *The Attorney General v. Brown* (b) is an authority to the same effect. It is denied that the prerogative exists with respect to writs of quare impedit and quare incumbravit. *Fitzherbert's Natura Brevium* (c) mentions the prerogative which exists with respect to both those writs, but there is no statement of the prerogative claimed: under the head of quare impedit it is there said, "the King may sue this writ in what Court he will." And again (d), quare incumbravit ought to be sued in the county where the church is, because the wrong is done there; and quare incumbravit doth not lie but where the plaintiff recovereth by judgment of Court; and the King may sue a quare incumbravit in the King's Bench, although the record of the recovery be in the Common Pleas; but a common person cannot do so." In the Year-book, 21 Edw. 3, 5, pl. 13, there is a case of quare impedit brought by the Crown for disturbing the King's presentment: the venue was laid in Wiltshire, where the cathedral church was, and it was objected that it ought to have been laid in Hampshire, where the manor was. The Crown did not set up, as an answer, that it had the prerogative of laying the venue in any county; but the answer that the Crown gave was, "that the action was properly brought in Wilts, where the cathedral church of the said prebend was; and for that reason it was agreed, by all the justices, that the writ was properly brought." That case is cited in *Merrick's case* (e) as an authority that the venue in quare impedit ought to be in the county where the church is. There is another

1841.

The
ATTORNEY
GENERAL
v.
Lord
CHURCHILL.

(a) Parker, 189.

(b) Bunbury, 236.

(c) 32 E.

(d) P. 48.

(e) 2 Dyer, 194 a.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

case of quare impedit by the Crown, in 43 Edw. 3, fol. 1; there, on one side, it was prayed that the venue might be where the deed was made; the other side contended that the venue should be where the advowson lay. In neither of these cases does the Crown set up the prerogative now contended for. The dictum of Lord Coke in *Bulwar's* case cannot be law. *Brooke*, in his *Abridgment*, tit. "*Lien*" (a), after stating the case, adds, "quod quære car mirum," and the doctrine is not found either in *Comyn's Digest*, *Bacon's Abridgment*, or *Fitzherbert's Natura Brevium*. The authority referred to in support of it in the Year-book, 4 Edw. 3, was not a question as to whether the King could lay the venue in any Court, but whether he could issue the writ into the county in which the defendant lived. That such is the case is evident from another case of quare impedit in the Year-book, 13 Edw. 3, (b). *The King v. The Inhabitants of Nottingham* (c) explains the case of *Rex v. The Inhabitants of Wilts*, and shews that the ground upon which the venue was removed to an adjoining county was, that all the inhabitants of the former county were liable to repair the bridge. If this prerogative had existed it would, undoubtedly, have been set up in *Rex v. Burdett* (d), where the question was as to trying a criminal information in the county of Leicester. [*Alderson*, B.—In the *King v. Hunt* (e), where the offence was committed in Lancashire and tried in Yorkshire, there was an application to the Court by the defendant, and the *Attorney* and *Solicitor Generals* shewed cause.] In the Order-book of this Court, which had been referred to, there are several instances of applications by the *Attorney General* to change the venue, but whether or no they were writs of intrusion does not appear (f). [*Parke*,

(a) P. 78.

(b) The interval in the Year-books, between the 10 & 17 Ed. 3, not being published, the case was quoted from the Translation by Serjt. *Manning*, in the Inner Temple Library.

(c) 2 Lev. 112.

(d) 3 B. & Ald. 717; 4 B. & Ald. 95.

(e) 3 B. & Ald. 444.

(f) The following were referred to: 21 January, 1707. *The Attorney General v. Wisker*. Mr.

B.—They must have been either writs of intrusion or quare impedit. In transitory actions, ex concessio, the Crown has the power of changing the venue without applying to the Court.] The entries referred to by the other side are in cases of scire facias, upon extents for debts due to the Crown, in which it is admitted that the Crown may have an inquisition in any county. The case of *Newar v. Moyle* (a) is a strong authority to show that this prerogative does not exist: there, a commission issued out of Chancery, in Michaelmas, 7 Jac., to inquire what lands and tenements the late prior of Bister, in the county of Oxford, had in Caversfield, in the county of Bucks, and to inquire of a rent reserved upon a grant made to Banbury, the last prior of the lands of the priory; and the question was, whether a jury of Oxfordshire could inquire into lands which the Oxfordshire church held in the county of Bucks, and the Court held they could not. That discussion would have been entirely unnecessary if the Crown, by its prerogative, could inquire by a jury of one county into facts respecting land in another. The form of the venire facias shows that it ought to issue into the county in which the lands lie. “Per quos rei veritas melius sciri poterit.” If

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

Shepherd to move the venue from London into Devon. No order.

1765. *The Queen v. Read*. Upon the motion of Mr. Attorney General, to change the venue. No order.

4 June, 1703. *The Queen v. Barker*. Upon the motion of Mr. Attorney General, to have the defendants alter their several pleas, and lay the several venues in London, and upon reading the affidavit of Mr. James Hod-den, it is ordered by the Court that the venue be laid in London, unless cause be shewn to the con-

trary, to-morrow.

Upon the motion of Mr. *Etterick*, of counsel for the defendant, shewing cause against an order of this Court, made in this cause, 4 June, instant, and, upon hearing Mr. *Dodd* and Mr. *Phipps* on the same side, and Mr. Attorney General for her Majesty, it is ordered, by the Court, that the venues in the defendant's pleas be altered, and laid in London, and that the defendants are to take notice of trial this Term, if, by the course of this Court, they are obliged to do so.

(a) Lane's Rep. 83.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

this prerogative had existed, it would have been unnecessary to pass those statutes which enable persons charged with criminal offences to be tried in different counties from those in which the offences were committed. Secondly, a writ of intrusion is not a personal action; it is the mode adopted by the Crown in lieu of real actions to recover property of which it has been disseised. It is said that no writ of habere facias follows the judgment, and that the action is for damages, and in that respect resembles an action of trespass quare clausum fregit; but that form of action is local, and though there is no writ of habere facias, the Crown may have a writ of amoveas manus, and a writ of injunction, to prevent the defendant from again intruding (a) The form of the writ of amoveas manus shews that a writ of intrusion is something more than an action of trespass, because it charges the defendant with intending to disinherit the Crown. In *Rex v. Ridsforth* (b) which was a writ of intrusion, it is said by the Court that "the suit is in the nature of an ejectio firmæ, and the party shall have execution by injunction each time, or otherwise the judgment is that the defendant be amoved from the possession." Several entries of writs of injunction, directed to the sheriff, are to be found in *Burton's Exchequer Practice* (c). The officers of the Court state that the practical mode of proceeding at the present day upon writs of intrusion is this: "judgment is entered, stating the verdict against the defendant. Then it states, that it appearing to the barons that the verdict is against the defendant, they order that thereupon he be convicted, and that the defendant be forthwith removed from the possession of the premises mentioned in the information. Then a writ of injunction issues, directed to the sheriff, ordering him to remove the defendant from the possession of the premises, and that all persons claiming through him also remove themselves. Then a writ of amoveas issues, directed to

(a) 2 Plow. 561.

(b) Saville, 35.

(c) Vol. 2, p. 290.

the sheriff of the county where the lands lie, directing the sheriff to remove the defendant from the possession and take the defendant, that he be fined for his contempt, and that writ is enforced by the *Attorney General*, directing the person to whom the sheriff is to deliver possession."

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

At common law, upon an information of intrusion, the King, by his prerogative, might put the defendant upon shewing his title, and if he pleaded not guilty he should be immediately put out of possession. But by 21 Jac. 1, c. 14, if the King or those claiming under him, or those under whose title the King claims, have not been in possession, or received the profits within twenty years, the defendant plead the general issue, and shall not be ousted of his possession till the title be found or adjudged for the King, *Bac. Abr.* tit. "*Prerogative*," 470. The practice in proceedings in writs of intrusion is also stated in *Comyn's Digest*, tit. "*Prerogative*," (C 77.) The passage which has been referred to in *Perrot's* case, and copied into *Viner*, for the purpose of shewing that this is a personal action, is the mere argument of counsel, and in no way adopted by the Court. [*Alderson*, B. The books of practice use the term "personal actions" incorrectly. I find it laid down that "any attorney plaintiff has the privilege in all personal actions, except in actions against attornies of his own Court, of suing in his own Court, and laying and retaining the venue in Middlesex." The form of the writ of privilege shews that it does not extend to actions respecting real property. The definition of personal action in *Comyn's Digest* cited from *Bracton* is this, "a personal action is such as concerns the person only by which nothing but damages can be recovered." *Parke*, B. In *Willis* 131, it is said, "Whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence, therefore replevin is a personal action."] The case of *Lester v. Edwards*, upon which the dictum in *Manning's Practice* is founded, has been misunderstood; it was a question of privilege, not of prerogative. There, an usher of this Court brought an ejectment in the

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

Court of Exchequer for lands in Wales, with intent to try it in the next adjoining English county. *Manwood*, B., says, "That he could not have the privilege for lands in Wales, for the 34 Hen. 8 requires the trial to take place in the county in which the lands lie. *Shute*, B., says, "If the Queen were a party, it may be tried here." In order to understand that case, it is necessary to consider what was the state of the law previously to the 34 Hen. 8. Before that statute, actions respecting lands in Wales were tried in the next adjoining English county; the origin of the practice is involved in obscurity, but it would seem that the reason was that there was no officer by whom a jury could be summoned in Wales. The 34 Hen. 8 obviated the difficulty, and it is clear, from the dictum of *Manwood*, B., that the judges then thought that actions respecting lands in Wales must be tried in Wales. *Shute*, B., says, "If the Queen were the party it may be tried *here*," that is, that the Queen might have tried it in the Court of Exchequer, and have a jury from an adjoining English county. That which follows applies to the usher, and means that the usher may sue in this Court for lands in England. That such is the meaning of the case is evident from a subsequent report of it in the same book. (a) The case in the Year-book, 13 Edw. 3, in which it was held that a præcipe quod reddat would lie here for a large seignory in Wales, shews that at that time the Courts here exercised dominion in Wales. The term "personal action," is used with extreme vagueness by different writers: *Blackstone's* definition is this, "Whereby a man claims a debt or personal duty or damages in lieu thereof, and likewise whereby a man claims satisfaction in damages for some injury done to his person or property." That definition would include an action of trespass quare clausum fregit and nuisance. In *Com. Dig.* tit. "Action," (N '12) the term "personal action" is several times used in a very indefinite sense. In *Bac. Abr.* tit. "Actions," (A a)

(a) No. 32.

trespass quare clausum fregit is described as a mixed action, and so is an action of waste. The more correct definition is in *Terms de la Ley*, where personal actions are said to be "such actions whereby a man claims debt or other goods and chattels, or damage for them, or damages for wrong done to his person." In the description in *Coke upon Littleton* (a) of the different forms of actions, the meaning of "personal action" is equally undefined. The text writers evidently use the term "personal actions" in the sense of transitory actions, and contradistinguished from actions local in their nature. The form of judgment upon a writ of intrusion is given in *Coke's Report*, 22 a, 30, by which it will be evident that the land itself is recovered. It may then more properly be called a mixed action, but at all events the term "personal action," in its strict sense is inapplicable. The division of actions into personal, real, and mixed, is comparatively of modern date. No mention is made of it in *Cowel's Interpreter*, which was written in the reign of James 1. Before the late alteration of the law, real and mixed actions could only be brought in the Court of Common Pleas, but an action of ejectment might have been brought either in this Court or in the Queen's Bench, first by privilege and afterwards by right. It was never objected that ejectment was a mixed action, and, therefore, ought to be confined to the Common Pleas, because there is nothing recovered by it but a term in the realty. [*Parke, B.*—A term in the realty is of some value, and there is something to be done on the land, which must be done by the sheriff of the county in which the land lies.] So it would be in a writ of intrusion. The distinction is pointed out in the case of *Winkworth v. Man* (b) which was a declaration in trespass upon a close containing an acre, abutting, &c., and the jury found a verdict for half an acre, part of the close; and the Court held that as damages were to be recovered, and nothing else, the verdict was good in the Exchequer. The text writers refer to *Bracton* as the authority for the division

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) P. 285.

(b) Yelv. 114.

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

of actions into real, personal, and mixed, but his definition has not the slightest application to those species of actions as understood in the present day. Speaking of transitory and personal actions, he says, “ Si aliqua vero sunt actiones quæ ex quacunque causâ detur in hæredes vel contra, dici poterunt transitoria, eo quod transeunt ad hæredes vel contra. Omnes fere personales actiones sunt ex contractu, sicut mutui, commodati, depositi, mandati, ex empto, verudito, locato, et conducto. Personales vero actiones quæ nascuntur ex maleficio, aliæ persequuntur poenam tantum sit actio furti, aliæ vero persequuntur ipsam rem et poenam sicut actio vi bonorum raptorum (a).” [*Alderson, B.*—Lord *Coke* says, “ that an action personal is an action where damages only occur (b).” He says, “ that a release of all actions would not bar an appeal of death, because there is judgment of death against the party; but it would an appeal of mayhem]. A release under the great seal of all “ personal actions, would not include the writ of intrusion, which is, in substance, a real action, and it is only by reason of the fiction of law, that the King cannot be disseised, that it at all resembles a personal action.

The *Attorney General*, in reply. The argument as to the improbability of the prerogative existing, in consequence of the ancient practice of summoning juries, would equally apply against allowing this right to the Crown in transitory actions, which has never been disputed. It is contended, that this prerogative cannot be allowed, unless instances are shewn of its exercise in this particular species of action; but in the case of an information by the Attorney General in the nature of an action of detinue or of covenant, it is probable that the records of the Court would afford no instance of its exercise, though the right is admitted to exist. A distinction is attempted to be drawn between transitory and local actions; but covenant on a lease is

(a) Title de Actionibus, cap. 3, p. 102.

(b) Co. Litt. 288 a.

sometimes transitory and sometimes local, and could it be said that the right exists in the former case but not in the latter? It is not to be expected that an adjudication can be found with reference to all the species of actions to which the claim applies, it is sufficient that there are particular cases in which the right has been acknowledged, and the general doctrine laid down, as in the Year-book, 4 Edw. 3. *The Queen v. Webb* and *Lester v. Edmunds*. *The Queen v. May* (a), which occurred in the 24 Eliz., shews that the term "transitory action" was well known in former times, and that a writ of intrusion is not a transitory action. That was an information of intrusion into lands in Sussex, against two defendants, one of whom pleaded title to lands in another ville, absque hoc, that he was guilty as to the lands in the information specified. *Manwood* says, this is not a good matter in bar to conclude against the traverse, for the plea is not of the same thing contained in the information, but of lands in another ville: that in trespass for a horse, the defendant could not justify the taking a cow, absque hoc, that he is guilty of a horse. *Shute* concurs, "mes autrement est de transitory actions." The term "personal actions," has not been used upon any solemn occasion in such sense as to exclude local actions, but it is used in contradistinction to real actions. [*Parke*, B.—In the case of the Crown it is difficult to see what real actions there are, except quare impedit.] The Crown may maintain ejectment; *Doe d. Hayne*, and *Rex v. Redfern* (b): which being a mixed action, is sufficient to satisfy the distinction. A correct definition of the different kinds of actions will be found in *Tidd's Practice* (c), where it is said, "Actions are commonly divided into criminal, or such as concern pleas of the Crown; and civil, or such as concern common pleas: and these latter are again divided into real and personal and mixed actions. In a real action the proceedings are in rem, for the recovery of real property. In a personal

1841.

The
ATTORNEY
GENERAL
v.
Lord
CHURCHILL.

(a) Saville, 34.

(b) 12 East, 96.

(c) P. 1.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

action they are in personam, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a mixed action they are in rem et personam, for the recovery of real property, and damages for withholding it." According to that definition, a writ of intrusion is a personal action, it is not for the recovery of the possession, but of damages only, and though the title to the land may come in question, it may also in trespass quare clausum fregit, or in replevin. With respect to quare impedit, it is expressly laid down in *Mallory*, p. 160, that the Crown may bring that action in what county it pleases. *The Queen v. Barker*, which has been cited from the Order-book, was a case of scire facias; and if that were any authority, it would go to this extent, that the prerogative claimed did not exist even in scire facias. *The Queen v. Reed* was a claim to goods, seized in the port of London. The authorities referred to, clearly shew that a writ of intrusion is a personal action, and if so, the Crown is entitled to the prerogative.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—In this case, of a writ of intrusion against Lord Churchill, for lands in Oxfordshire, the *Attorney General* obtained, in January last, an order upon his simple suggestion, without affidavit, to have the venire awarded into Hertfordshire, on the authority of *Rex v. Parsons (a)*. On the 22nd January, Sir *William Follett* moved to discharge that order, and a rule nisi having been obtained, the *Attorney* and *Solicitor General* shewed cause, and the case was argued in the absence of the Lord Chief Baron very elaborately, and with great ability on both sides. The case, however, notwithstanding the great learning and research which was brought to bear upon it, really lies in a very narrow compass. A subject would have no right to pursue such a

(a) *Ante*, vol. 5, p. 165; 2 M. & W. 23.

course, but the Crown has most undoubtedly many prerogatives in the conduct of suits, and the question is, whether this be one? This question must be determined, as such always are, by authority, viz., by precedents and the decisions and dicta of judges and text-writers. As to precedent, there is none in the case of a writ of intrusion, except that of *The King v. Parsons*, which we know was decided ex parte, and under a mistake, occasioned by an inapplicable quotation of a case in *Saville*, in my Brother Manning's *Treatise on Exchequer Practice*, and many other precedents, which were cited for the recovery of debts due to the Crown on inquisitions under extents and outlawries do not apply. As to the dicta and decisions, first of judges, and secondly, of text-writers; the former are to be found in the case of *Rex v. Webb* only, and the latter appear to be all derived from that case; *Comyn*, in his *Digest*, (D 85), says, "The King may lay his action in what county he pleases in any personal action," and the same author, title "*Debt*," (b 12), refers to *The King v. Webb* (a), in which case the Court held, in an action for embezzling the King's goods, that the King might choose his county; and in the report in *Siderfin*, it is said, "The King has his prerogative to try his personal actions where he pleases." In truth, this latter expression is the foundation of all that has been said on the subject, and admitting that it is law, the only point is in what sense the word "personal" is there used. It is capable of two different senses. Actions may be personal, as contradistinguished from real and mixed; the first being actions against the person only for damages, the second for recovery of real estate, and the third for both. In this sense of the word "personal," there appears to be no question but that an information of intrusion is a personal action, for its object is the recovery of damages, not the recovery of the estate, for the Crown has never, in contemplation of law, lost it. But the word "personal" may mean

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

(a) 1 Vent. 17; 1 Sid. 412.

1841.
 {
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

such actions as are for the recovery of debts or damages to the person or personal effects, and in this sense of the word a writ of intrusion is not a personal action. It gives some colour to this construction of the word, that the dictum of the Court in the case, both as it is reported in *Siderfin* and *Ventris*, is, in reference to an action of this nature, an information in the nature of trover. But it is said, that this construction of the word "personal" would give the Crown no prerogative at all, because every subject has the same right. That, however, is not correct, for there are statutes to oblige the subject to lay the venue where the cause of action arose, in transitory actions, and a long established practice founded thereon, to change the venue. There is a very old statute referred to by Mr. *Tidd*, as contained in the laws of Henry 1, (which, however, is not found in the edition of Statutes published by the commissioners of Public Records, nor in the Appendix to *Ruffhead*). This provides that every one is to be judged by his peers, and of the same "county." "Unusquisque per pares suos judicandus est et ejusdem provinciæ, peregrina vero judicia modis omnibus submoveant." This may possibly apply to trials in criminal cases, and to judgments of tribunals abroad. But the 6th Rich. 2 was passed to confine actions of debt, account, and other such actions to their proper counties. This enactment, from the nature of its provisions, was evaded, and to remedy the evil, the statute 4 Hen. 5, c. 18, was passed, which directs attorneys to be sworn not to sue in a foreign county. After that statute, a practice appears to have prevailed, to plead the impropriety of the venue in abatement of the writ, even before the plaintiff had declared, and afterwards the defendant was allowed to traverse the venue, and try the traverse by the country. This is the statement of Mr. J. *Blackstone*, in the 1st vol. of his Reports, page 1032, in the case of *Santler v. Head*. The practice of changing the venue on motion was introduced upon the equity of the stats. Rich. 2 and Hen. 4, and this practice, Lord *Holt* says, began in the reign of James 1.

That is stated in *Salkeld*, 670. But neither these statutes, nor the practice of the Courts, bound the Crown, and, consequently, with respect to all personal actions, in the sense of transitory actions, the Crown had a privilege which the subject had not, and it seems highly probable that this was all that the Court intended in the case of the *King v. Webb*, for as it is reported in *Siderfin*, it was a motion by the defendant to change the venue from Middlesex to London, because, if there was any conversion, it was in London, but the Court refused it, and said, the King had a prerogative to try his personal actions any where. According to the report in *Ventris*, the motion was by the Crown. But with this uncertainty attending the principal case, on which the authorities in the text-writers wholly depend, and in the absence of any precedent whatever in an information of intrusion or other action usually termed local, (for the precedents in cases of recovering debts due to the crown upon inquisitions in outlawry and extent, as has been before said, do not apply), we think that the Crown officers have failed to establish the right to the prerogative claimed. It may be added, that in the only precedent of an award of venire to a different county in an information of intrusion, which was cited from the Record in 7th Eliz., the suggestion by the *Attorney General* is on the special ground, that the issue could not be indifferently tried in the county where the lands lie, namely, Durham, which affords a strong ground for believing that he had no right to such a venire, as a matter of course, by virtue of prerogative. The rule in this case must, therefore, be made absolute. But the *Attorney General* may, if he think fit, as was done in the last case cited, apply to the Court for a writ in a different county on a similar suggestion.

1841.
 The
 ATTORNEY
 GENERAL
 v.
 Lord
 CHURCHILL.

Rule absolute (a).

(a) The *Attorney General* subsequently obtained a rule for the venire to issue in Hertfordshire, upon affidavit, stating special grounds.

1841.

FOX v. VEAL.

A local Court act provided that no plaint, order, judgment, or proceeding therein, should be removed into a superior Court, except by leave of a judge, and then only when the debt exceeded 5*l.*, and that in all such cases, it should be lawful for a judge to stay proceedings, &c., and concluded with a proviso that the enactments of the 1 & 2 Vict., c. 110, respecting the removal of judgments from inferior Courts to the Courts at Westminster, for the purposes of execution, should be applicable to the local Court.

Held, that a judge had no power to remove the proceedings, after judgment, except for the purpose of having execution issued on them.

THIS was an application to set aside two judges' orders under the following circumstances:—The plaintiff had commenced a suit by plaint against the defendant in a local court established under the 2 & 3 Vict. c. 103, (a) for the recovery

(a) Intituled an act for the more easy and speedy recovery of small debts in the parish of Eckington and other places in the county of Derby, and obtained the royal assent, August 17th, 1839. After establishing a Court for the recovery of small debts in that district, it enacts, by the 20th section, that all actions for the recovery of debts, where the sum sought to be recovered, does not exceed the sum of 15*l.*, and is claimed from any person liable to be summoned as a defendant under the provisions of this act, may be tried and decided by the judge of the said Court, wherever the cause of action may have arisen, or the plaintiff may reside: Provided always, that the said judge shall not decide or determine any such action in which the title to any lands or hereditaments or to any tithe, toll, fair, market, or franchise, shall be in question, or arising out of or relating to any will or settlement.

By sect. 23. The form of action is to be by plaint in writing, whereupon a summons is to be issued under the seal of the Court.

By sect. 28. The judge of the said Court to be the sole judge, to determine all actions brought

in the said Court, and all questions of law and fact relating thereto, except where the amount claimed shall exceed the sum of 5*l.*, and either of the parties shall require a jury to be summoned; and by sect. 29, in all actions when the sum sought to be recovered shall exceed 5*l.*, it shall be lawful for the plaintiff or defendant to require a jury to be summoned.

By sect. 33. All causes brought before a jury under the provisions of this act shall be decided by the verdict of the jury, and judgment shall be given accordingly, except it shall appear to the judge, that a wrong verdict shall have been returned in consequence of some error or mistake on the part of the said jury; in which case, it shall be lawful for the judge, on the application of either party to the action, to order a new trial, and, in the meantime, to stay proceedings thereon: Provided that no new trial shall be granted unless the party applying for the same shall, prior to the same being granted, pay the costs of the first trial, and give such security as shall be approved of by the Court, for the costs of such new trial, &c.

of small debts in the parish of Eckington in the County of Derby to recover the sum of 15*l.*, the balance of an account. The cause was heard before the judge of the Court, who, without the assistance of a jury, decided in favour of the plaintiff. An application was afterwards made by the defendant for a new trial, which was refused, and the plaintiff sued out execution, and levied the sum of 15*l.* Whilst the money was in the hands of the bailiff, application was made to *Rolfe, B.*, for leave to remove the plaint into the Court of Exchequer, under the 46th section of the 2 & 3 Vict. c. 103, (*a*)

1841.

Fox
v.
Veal.

(*a*) No plaint entered in this Court, nor any order, judgment, or proceeding therein, shall be removed into any superior Court, by any writ or process whatsoever, except by leave of a judge of one of the superior Courts at Westminster, and then only in cases where the debt claimed shall exceed 5*l.*; and, in all such cases, it shall be lawful for every such judge, by an order in writing, under his hand, to stay all proceedings in the Court hereby created, upon such terms as to giving security for the costs incurred in the said Court hereby created, and for the costs which may be incurred in any action to be brought in the superior Courts for the same matter, or otherwise, as such judge shall direct: Provided always, that the provisions contained in an act of parliament passed in the 2 Vict., intituled, "An Act for abolishing Arrest on Mesne Process in Civil Actions, &c.," relating to any writ of fieri facias, to be sued out of any inferior Court, and to the removal into any of her Majesty's superior Courts of Record at Westminster, of any judgment, rule, or order,

of any inferior Court of Record, in which, at the time of the passing of that act, a barrister, of not less than seven years' standing should act as judge, assessor, or assistant, on the trial of causes; and the force and effect of any such judgment, rule, or order, when so removed, shall, notwithstanding anything herein contained, be applicable and applied to executions against goods, chattels, and personal estate, issued by the Court, by this act established, in pursuance of the provisions herein contained, and to the removal into any one of the said superior Courts of Record, of judgments, rules, and orders for the payment of money, exceeding the sum of 5*l.*, made or given by the said Court hereby established, and to the force and effect of such judgments, rules, and orders, when so removed, in as full and ample a manner as if the said Court, hereby established, had been an inferior Court of Record, in which, at the time of the passing of the said recited act, a barrister, of not less than seven years' standing, had acted as judge, assessor, or assistant in the trial of causes."

1841.

FOX
v.
VEAL

and the learned judge ordered that on the defendant bringing into Court the sum of 15*l.*, and giving security for the costs below and above the plaint entered in the Court below be removed into the Court of Exchequer, and in the mean time all proceedings be stayed. A subsequent order was made by *Gurney*, B., varying the previous order so far as it required the defendant to bring the money into Court, and ordering it to remain impounded in the hands of the bailiff.

W. H. Watson had obtained a rule nisi, to rescind these orders, on the ground that the section referred to did not authorise a judge to remove the plaint after judgment had been given in the Court below.

Hoggins shewed cause, and contended, that the power to remove the plaint after judgment, was given by the express words of the 46th section. That section enacted, that no plaint, order, judgment, or proceeding therein, should be removed into a superior Court, except by leave of a judge, and then only where the debt claimed exceeded 5*l.*, “and in all such cases it shall be lawful &c.,” for a judge, by order in writing, to stay proceedings, &c.

W. H. Watson, in support of the rule. The words of the statute are merely negative, and the meaning of it is, that in all cases in which a plaint might then be removed to a superior Court, the order of a judge shall be requisite for that purpose. A power to remove the cause after judgment would be nugatory, inasmuch as the statute contains no provisions to compel parties to declare anew, or to send the case down for a new trial. He referred to *Simons v. De Witts*. (a)

PARKE, B.—It seems to me impossible to say, on the construction of the 46th section, that the legislature meant that a judge of the superior Courts should sit as a Court of

(a) Not yet reported. (Bail Court.)

appeal to review all that is done in the Court below. If it were not for the word "judgment" in that section, there could have been no difficulty whatever on the subject, and the obvious construction would have been, that though the amount claimed exceeded 5*l*, the proceedings could not be removed by the usual process of law, without the previous sanction of a judge of the superior Courts. But then the use of that word is explained by the subsequent part of the section, which provides, that the proceedings in any stage may be removed under the act for the abolition of arrest on mesne process; and shews that the true construction of the clause is, that the judge of the Court above is to have a discretionary power to remove the proceedings at any stage for the purpose of issuing process under that statute. The general rule is, that proceedings in inferior Courts cannot be removed by certiorari after judgment, and I cannot go so far as to hold that by the negative words of this section a power is invested in a judge of the Court of Westminster to decide on the merits of all cases determined in the local Court whenever the sum in dispute shall exceed 5*l*. If the legislature intended to confer such a power, they should have used clearer words than are found in this section; for suppose the record removed, what is the Court above to do with it, further than for the purpose of execution? The act gives them no power to alter the judgment.

1841.
 }
 Fox
 v.
 Veal.

Rule absolute.

—◆—
 THOMAS, Administrator, &c., of W. THOMAS, v. HAWKES,
 and Another.

ASSUMPSIT by administrator of payee against the joint makers of a promissory note. The declaration also contained a count for money due to the intestate on an account

Under the plea of non assumpsit to a count on an account stated, the defendant

may shew that there were errors in the account.

1841.
 THOMAS,
 Administrator,
 &c., of
 W. THOMAS,
 v.
 HAWKES,
 and Another.

stated, to which the defendants pleaded that they did not promise.

At the trial before Lord *Abinger*, C. B., at the London Sittings, after last Michaelmas Term, the plaintiff gave in evidence, certain accounts between the defendants and the intestate, and proved an admission, by the defendants, of their correctness. In answer to this, the defendants' counsel proposed to shew that there were mistakes in the accounts. The learned judge rejected the evidence, on the ground that the only question under the issue was, whether or no, an account had, in fact, been stated, and that the circumstance of an error in the account should have been specially pleaded. A verdict having been found for the plaintiff, a rule nisi, to set it aside, was granted, against which,

Erle and *Montague Chambers* shewed cause, and contended, that the statement of an account was evidence of a promise to pay, which was the only question raised by the issue.

Humfrey and *J. Henderson*, in support of the rule, were stopped by the Court.

ALDERSON, B.—The rule must be absolute. If an account stated, stood upon the same footing as a count on a bill of exchange, there would be some weight in the argument on the part of the plaintiff; but the mere statement of an account does not raise a promise to pay. The count alleges, not merely that an account was stated, but that the defendants were indebted upon it. How can a defendant confess and avoid that he is indebted on that which is no account stated unless it be correct.

Lord ABINGER, C. B., and ROLFE, B., concurred.

Rule absolute.



1841.

HARRIS and Another v. TURTLE.

HANCE moved to discharge the defendant out of custody, under the 48 Geo. 3, c. 23, s. 1, he having been detained in execution more than twelve months, for a debt under 20*l*. The peculiarity in the case was, that there were two plaintiffs in the action, but notice of the defendant's intention to apply for his discharge was served upon one only. It was questionable whether such service was sufficient for a rule absolute in the first instance.

Service upon one of several plaintiffs of the defendant's intention to apply for his discharge, under the 48 Geo. 3, c. 123, s. 1, is sufficient for a rule absolute in the first instance.

PER CURIAM.—We think you are entitled to a rule absolute.

Rule absolute.

SCHILD v. KILPIN.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. The declaration, after stating the drawing of the bill, the acceptance, and indorsement, alleged that the defendant "promised the plaintiff to pay the amount of the bill according to the tenor and effect thereof." Breach, that he hath not paid the bill or the monies therein specified.

Plea. That after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff, for a good and valuable consideration in that behalf, indorsed the bill to a certain person, to wit, to one R. S. Wright, who, from thence until and at and after the commencement of the suit, was and still is, and remains the indorsee and holder thereof; and the defendant, from the time of such

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to W., who, from thence, until, and at and after the commencement of the suit, was, and still is, the indorsee and holder thereof.

Replication de injuriâ: *Held*, that the plea was not in excuse but in denial of the breach in the declaration, and, consequently, de injuriâ was not the proper replication.

1841.

SCHILD

v.

KILPIN.

indorsement, continually hitherto hath been and still is liable to pay the amount of the said bill to him. Verification.

Replication de injuriâ.

Special demurrer, assigning for causes, that the replication is too large, inasmuch as it puts in issue two distinct and material facts, either of which is an answer to the action: that it is inconsistent and insensible, as it assumes that the plea of the defendant admits that defendant has committed a breach of his promise, and is merely in excuse of such breach, whereas the plea shews the right of action upon the bill was, at the time of the commencement of the suit, and also of the pleading of the plea, vested in some person other than the plaintiff; and it no where appears from the plea that any breach of the defendant's promise, sufficient to give the plaintiff a cause of action on the bill, has been committed, as it is consistent with every allegation of the plea that some arrangement may have been entered into between the said indorsee of the bill and the defendant before the bill became due, postponing the time of payment of the bill and continuing the defendant's liability thereon without giving any cause of action: that the replication is ambiguous, as it leaves uncertain whether the plaintiff insists upon the fact of no indorsement of the bill having been made; or, if any indorsement was made, that the plaintiff has again become the holder of the bill, and entitled to sue thereon; and, if the former is the case, the proper form of pleading would have been to have traversed the indorsement; if the latter, to have admitted the indorsement and set forth the means by which the plaintiff became again entitled to sue on the bill: that the replication is double, as it puts in issue both the fact of the indorsement over, and also the fact of some person other than the plaintiff being the holder, and entitled to sue: that the defendant's plea is founded upon, and involves and implies, the existence of authority derived mediately or immediately

from the plaintiff, inasmuch as it is quite consistent with the plea that some agreement, suspending the right of action on the bill, may have been made and entered into between the defendant and the indorsee thereof, which indorsee derives his power and authority to make and enter into the said agreement immediately from the plaintiff.

1841.

SCHILD

v.

KILPIN.

Corrie, in support of the demurrer. If the plaintiff never at any time had a cause of action on the bill, *de injuriâ* is not a good replication. The declaration does not allege a promise to pay the bill to the plaintiff, but only a promise to pay the bill. The breach assigned is, that the defendant did not pay it; the plea admits the promise as alleged, but shews that the right to sue in respect of the breach of it is vested in some other person. That is not a plea in excuse of non-payment, for it shews that there never was any liability to pay the plaintiff. Where to a declaration on bills of exchange for 520*l.*, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded that before the accepting of the bills he was indebted to M. in a large amount, and that they were accepted on account of 520*l.*, part of the debt: that after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was in embarrassed circumstances and unable to pay his debts in full, and thereupon, by an instrument in writing made between M. and the said other persons of the one part and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7*s.* in the pound on their respective debts, payable on a day named (which was after the bills became due): that the composition was paid, and that before the commencement of the suit M. paid the plaintiff sums of money sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bill in the declaration mentioned, and

1841.

SCHILD

v.

KILPIN.

all money due from M. to the plaintiff in respect of the bills, or otherwise, and all claims and demands of the plaintiff in respect of the bills, or otherwise, on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them, or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills without consideration, and in fraud of the defendant and his creditors: it was held, that the replication *de injuriâ* was bad, for the plea amounted to matter of discharge and not of excuse. *Jones v. Senior* (a). So in the present case, the plea shews that the plaintiff's right to sue on the bill is discharged by the indorsement to another person.

Ogle, *contra*. The plea is bad. If the plaintiff was the holder of the bill at the time it became due, a right of action vested in him. The defendant seeks to defeat that right, by shewing that the plaintiff afterwards indorsed the bill to another person; but that circumstance affords no answer. The plaintiff may have indorsed the bill to his banker or agent for the purpose of being presented for payment; but that would not affect his title to sue. To render the plea good, it should have been averred that the plaintiff had no interest in the bill at the time of the commencement of the suit. *Stones v. Butt* (b), shews that the mere circumstance of a person having indorsed a bill to another, as a trustee for him, does not effect his title to sue on it. If a plaintiff deposit a negotiable instrument on which he is suing, at the same time giving notice of the action, he does not thereby part with his right of action. *Marsh v. Newall* (c). The plea does not shew when the bill was indorsed away by the plaintiff; but if it means that the indorsement was made *after* the bill became due, it is only excuse for non-payment, and the replication is good.

(a) 4 M. & W. 123: *Ante*, vol. 6. (c) 1 Taunt. 169.

(b) 2 C. & M. 416.

Corrie, in reply, referred to *Isaac v. Farrar* (a) and *Johnson v. Kennion* (b).

Cur. adv. vult.

1841.

SCHILD
v.
KILPIN.

ALDERSON, B., now delivered the judgment of the Court. The declaration was on a bill of exchange, in the ordinary form, stating that the plaintiff was indorsee of the bill of exchange, and stating also that the defendant had not paid the bill according to his promise. The plea was, that before the commencement of the action the plaintiff had indorsed the bill over to a third person, who was, at the time of the commencement of the action, the holder of the bill, and still is the holder of the bill. To this the plaintiff replied *de injuriâ*, and upon that there was a demurrer; and the question is, whether the replication *de injuriâ* is in that case a good and valid replication, and we are of opinion that it is not. The replication *de injuriâ* is only good where the plea admits a breach of the promise stated in the declaration, and alleges circumstances whereby that breach is excused. That was the law already laid down in *Isaac v. Farrar* (c), and afterwards this Court determined that, to a plea whereby the breach was merely discharged *de injuriâ*, was not a good replication. Now, what is the breach in the replication? It is the non-payment of the bill according to its tenor and effect, and payment according to the tenor and effect of the bill is a payment to the holder of the bill; that is to say, either to a person to whom it was originally made payable, or to a person to whom afterwards it was so made payable, and was subsequently transferred by a valid indorsement and delivery. The declaration avers the plaintiff to be a person of that description, and avers that the bill was indorsed to him: the plea admits that; but it further adds, that it was afterwards indorsed by the plaintiff to A. B., and that A. B. was and still

(a) *Ante*, vol. 4, p. 750; 1 M. & W. 65.

(c) 1 M. & W. 65; *Ante*, vol. 4, p. 750.

(b) 2 Wils. 262

1841.

SCHILD

v.

KILPIN.

is the holder of the bill. If, therefore, the averment that the bill has not been paid be in the declaration, as it probably is, an averment that it has not been paid to the plaintiff, the plea amounts to a denial that such non-payment to the plaintiff is a breach of the promise of the defendant, for a non-payment to the plaintiff, he not being at the time the holder, is not a non-payment to the holder of the bill. Instead, therefore, of the plea amounting to an excuse for the breach, it is, in fact, a denial of the breach in the declaration, and consequently *de injuriâ* is not the proper replication. For these reasons we are of opinion that judgment must be given for the defendant; but the plaintiff must have liberty to amend, if he pleases, by replying in the way in which, it now appears, the Court has decided to be a proper and valid replication (a).

(a) The decision alluded to, appears to be *Fraser v. Walch*, ante, p. 754.

POTTER v. NICHOLSON.

The witness to a cognovit, executed since the 1 & 2 Vict. c. 110, s. 3, must not only declare himself, in the attestation, to be the attorney for the party, but also that he subscribes his name as such.

PASHLEY had obtained a rule nisi to set aside a cognovit on the ground that it was not attested in the manner prescribed by the 1 & 2 Vict. c. 110, s. 9. The attestation was as follows:—"Witnessed by Joseph Bamford, one of the attornies of her Majesty's Court of Exchequer of Pleas at Westminster, attending for the said William Nicholson at his request to, and did inform him of the nature and effect of the above cognovit before the execution thereof by him." The objection was, that it did not appear by the attestation that Bamford subscribed his name as the attorney for Nicholson.

Knowles shewed cause. The 1 & 2 Vict., c. 110, s. 3, is merely an extension of the rule of H. T. 2 Wm. 4, rule 72, which provides "that no warrant of attorney to confess judgment or cognovit actionem given by any person in custody,

shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney." Under this rule it has been expressly held that it is sufficient for the attorney to declare by parol that he acts as such for the defendant. *Wilson v. Price.* (a) The rule, indeed, does not contain the word "thereby," which is inserted in the statute, but it is submitted that they are in *pari materiâ*, and that the same construction must be put on both.

1841.
 POTTER
 v.
 NICHOLSON.

Pashley, in support of the rule. The question turns upon the language of the 1 & 2 Vict. c. 110, s. 9, which enacts, "that no warrant of attorney to confess judgment in any personal action or cognovit actionem given by any person shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and that he subscribes as such attorney." *Poole v. Hobbs* (b) is an express authority that this attestation is insufficient: there the attestation was, "Witnessed George Edwards, defendant's attorney, named by him and attending at his request." And *Coleridge, J.*, in delivering judgment says, "The legislature has determined to prevent the necessity of any recourse to parol evidence to ascertain whether the witness is the attorney of the party or not, and in its anxiety to secure that has also gone on additionally to require that in his attestation he should state that he

(a) *Ante*, vol. 4, p. 213.

(b) *Ante*, vol. 8, p. 113.

1841.
 {
 POTTER
 v.
 NICHOLSON.

makes it as such attorney. * * * There is always danger in accepting anything in lieu of a literal compliance with the statute, such a practice at least tends to make the construction uncertain, and too often ends in frittering away the provisions, while on the other hand, no compliance is so simple and easy for the practitioner as a literal one."

LORD ABINGER, C. B.—The introduction of the word "thereby" in the statute makes a very important distinction between it and the rule. According to the latter, it would be sufficient if the attorney declared verbally that he acted on behalf of the party, while, by the statute, on the contrary, the Legislature seems desirous of carrying the principle further, and to require that he should declare himself such in the attestation, and also state that he signs it as such. The word "thereby" seems used *ex industria*, to distinguish attestations under the act from those under the rule. Besides, it is better in matters of this description to adopt some general rule, and, as the question has been already decided in *Poole v. Hobbs*, and there is nothing to induce us to think that decision wrong, it is better to adopt the rule there laid down, and hold this attestation insufficient.

ALDERSON, B.—It is very easy for parties to prevent any inconvenience, by simply following the directions of the statute.

Rule absolute.

BILL v. BAMENT.

Where an order for a *capias* under the 1 & 2 Vict. c. 110, s. 3, was obtained upon an affidavit, signed by the deponent, but the jurat was not signed by the judge before whom it was sworn, until after the order was made and acted upon, the Court set aside the proceedings for irregularity.

IN this case a judge's order for a *capias* had been obtained under the 1 & 2 Vict. c. 110, s. 3. The affidavit upon which the order was obtained was signed by the deponent, but the jurat was not signed by the judge before whom it was sworn, until after the order was made and acted upon, the Court set aside the proceedings for irregularity.

was sworn. A *capias* had issued, under which the defendant was arrested, but he was subsequently discharged on bail. After the writ had been executed, the affidavit upon which the order was obtained was laid before the judge, marked with the initials of his clerk, and the learned judge signed it in the usual course.

1841.
BELL
v.
BAMENT.

Whately had obtained a rule nisi to set aside the order and *capias* issued thereon, and all subsequent proceedings for irregularity.

E. James shewed cause. This is not a mistake arising from the negligence of the deponent or his attorney. The usual course is for the judge to attach his signature after the affidavit is sworn, and transferred into the hands of the judge's clerk. The parties could have no means of knowing whether or not the judge had signed the affidavit. Besides, the judge's signature is not an essential part of the affidavit, and perjury might be assigned though it was omitted.

Whately, in support of the rule, contended that all mistakes in the jurat of an affidavit were fatal, and that the subsequent signature of the judge could not have a retrospective effect so as to render the affidavit valid. He cited *Blackwell v. Allen*. (a)

LORD ABINGER, C. B.—The objection must prevail, unless we can be convinced that the plaintiff could act upon the affidavit, without a judge's signature at all. We think he could not, and that the subsequent signature does not cure the original omission.

PARKE, B.—The order was made and acted upon while the affidavit upon which it was founded was in an imperfect state. If the subsequent signature of the judge is held to

(a) 7 M. & W. 146.

1841.

BELL

v.

BAMENT.

relate back to the time the affidavit is sworn, all errors in the jurat of an affidavit might be corrected in a similar manner.

ALDERSON and ROLFE, B.'s concurred.

Rule absolute.

*See this rule how it relates in case of
urgent necessity in *Fraser v. Beatty*
10 L. J. Q. B. 395.*

MONDELL v. STEELE.

J. C. S. M. & W. 300.

An examination of a witness, vivâ voce, before the Master, under the 1 Wm. 4, c. 22, cannot be taken until after issue joined.

THIS was an action for breach of a contract to build a ship. Before issue joined, a rule nisi had been obtained on the part of the plaintiff under 1 Wm. 4, c. 22, for the examination of witnesses vivâ voce before the Master. The persons whom it was proposed to examine, who were sworn to be necessary and material witnesses, were the captain and an apprentice aboard the ship, who were about to sail for South Australia, and were not expected to return for two years.

Martin shewed cause in the first instance, and contended that it was an established rule of practice that an application like the present could not be made until after issue joined.

Cleasby, in support of the rule, submitted that it was a matter in the discretion of the Court, and that the party making the application subjected himself to costs in the event of the examination being unnecessary.

ALDERSON, B.—How can a party swear that the witnesses are material, before it is known what issue is raised? or how could the witnesses be indicted for perjury? They are sworn and examined with respect to the issues joined. The question has frequently come before me at Chambers, and I have always told the parties that the application was

premature. My brother *Rolfe*, however, says, that it is the practice in Chancery to allow interrogatories to be taken the moment a bill is put upon the file. The object of the act was certainly to invest Courts of law with the same powers in this respect as are possessed by Courts of Equity. The matter had better stand over for the present, and we will consider it.

1841.
MONDELL
v.
STEELE.

Cur. adv. vult.

On a subsequent day, *Cleasby* stated to the Court that in the case of *Spalding v. Mure*, cited in 2 *Tidd's Prac.*, 814, the Court of King's Bench had allowed a commission under the 13 Geo. 3, c. 63, s. 44, for the examination of witnesses in India before issue joined. He then offered to undertake, in the event of the rule being made absolute, that the examination should not proceed until after issue joined.

PARKE, B.—You must have an issue as to which the witnesses may be examined, unless the other party will dispense with it.

LORD ABINGER, C. B.—There must be an issue joined before the examination is taken.

It was then agreed that the rule should be absolute, the plaintiff undertaking not to proceed with the examination until after joinder of issue.

Rule absolute accordingly.

— *See Hunt v. Rush. 4. Exch. 490.*

MIDFORD v. FINDEN AND ANOTHER.

Reported 9 M. & W. 511.
THIS was an action by payee against makers of a promissory note. The defendants, (who were under terms of To an action by payee against makers of a promissory note, the defendants pleaded that there was no consideration for the note, and that it was made subject to the condition that the defendants should not be called upon to pay the same if they were not able, but that the same should be renewed. Upon affidavit that the plea was false, the Court allowed the plaintiff to sign judgment.

1841.
 MIDFORD
 v.
 FINDEN
 and Another.

pleading issuably,) pleaded that there was no value or consideration for the making of the said note, and that it was made subject to certain terms and conditions, viz. that the defendants should not be called upon to pay the same, if they were not able, but that the note should be, from time to time renewed, until they should be able to pay it.

Crompton had obtained a rule nisi to set aside the plea as frivolous. He moved upon an affidavit that the plea was utterly false.

W. H. Watson shewed cause. The Courts will not set aside a plea merely on the ground that it is false. *Miley v. Walls* (a) may, perhaps, be cited as an authority for the plaintiff, but that case was decided before the New Rules, which have abolished the general issue in actions on bills of exchange. But even under the old practice, where a party pleaded a judgment recovered, which was evidently false, and for the purpose of delay, the Court have refused to interfere. In *Cowper v. Jones* (b), which was a similar application to the present, *Patteson, J.*, says, "unless the defendant was under terms of pleading issuably, or the plea pleaded raised a different issue, the Court cannot interfere. The plea may contain a statement of facts which may, or may not be true, and which are not sufficient, in point of law, as an answer to the action. That, however, is not a reason for setting it aside. I have no power to do it. I know the Courts some years ago, used to interfere when the plea was frivolous, and authorize the plaintiff to sign judgment as for want of a plea. But the Courts afterwards retraced their steps, on the ground of a doubt they had as to their power so to do. The Courts, therefore, now, never interfere, unless the defendant is under terms to plead issuably, or under some special circumstances." *La Forest v. Langan* (c), and *Merington v. Becket*, (d) are authorities

(a) *Ante*, vol. 1, p. 648.

(b) *Ante*, vol. 4, p. 592.

(c) *Ante*, vol. 4, p. 642.

(d) 2 B. & C. 81.

to shew that the Courts will not interfere merely because the plea is false.

1841.

MIDFORD

v.

FINDEN
and Another.

Lord ABINGER, C. B.—In those cases the pleas were good upon the face of them. Here the plea is both tricky and false. The plaintiff must demur, or if he reply, his replication is open to a demurrer.

ALDERSON, B.—The rule of the Courts seem to have been to set aside pleas which are both tricky and false.

Rule absolute.

PAGE v. PEARCE.

THIS was a rule calling on the plaintiff to shew cause why the Master's allocatur, allowing costs to the plaintiff in this cause, should not be set aside. It appeared that this was an action of trespass, in which a writ of inquiry had been executed before the undersheriff of Dorsetshire, and the jury assessed the damages at one farthing. The undersheriff was applied to to certify, under the 3 & 4 Vict. c. 24, s. 2; and at the adjournment of the Court, for the purpose of taking an inquisition under a writ of elegit in another case, he stated that he would certify that the grievance was wilful, but he could not say it was malicious. Afterwards the plaintiff gave notice of taxation, and on attending before the Master the writ of inquiry was produced, when there appeared indorsed upon it the undersheriff's certificate, that the grievance in respect of which the action was brought was wilful and malicious. The Master, thereupon, allowed the plaintiff his costs.

The words "immediately afterwards" in the 3 & 4 Vict. c. 24, s. 2, by which a plaintiff is deprived of costs, (if in certain actions he recovers less than 40s. damages,) mean within a reasonable time after the trial.

Cresswell and *Barstow* shewed cause, and referred to *Thompson v. Gibson* (a) as decisive of the point.

(a) *Ante*, vol. 9, p. 717.

1841.

PAGE

v.

PEARCE.

Erle and Bond, contra. [*Alderson*, B.—The certificate must be given within a reasonable time after the trial. How does your affidavit shew that it was not? Lord *Abinger*, C. B.—The literal interpretation of the act would be absurd.] A judge has no authority whatever over the record after the trial. There is a case of *Shuttleworth v. Cocker* (a), decided in Michaelmas Term, in which *Tindal*, C. J., intimated an opinion, that the judge ought to certify directly; or, at all events, on the day of trial. The statute requires that it shall be done “immediately afterwards.” Here, however, after the trial was over, the Court adjourned, that the undersheriff might attend to another case, and the certificate was probably indorsed on a subsequent day. If it is competent for the judge to certify after the trial of another case, or after the transaction of other business, there seems no reason why he should not do so after a series of subsequent trials. But the evident meaning of the statute is, that no other business is to be transacted until the judge has made up his mind whether he will certify or not.

LORD ABINGER, C. B.—This rule must be discharged. It has been decided that an immediate indorsement on the record never could have been meant. Then what better substitute can there be than a reasonable time, especially as an immediate indorsement can be of no importance at all. The judge’s commission is contained in the writ, and his authority under the commission may be said to expire with the trial or investigation; but as an act of Parliament requires him also to consider the propriety of granting or refusing a certificate, he has a new commission for that purpose. Though another trial may have expired, yet if the act says only that the judge shall certify immediately after the trial, and does not more specifically define the time, it is sufficient if it is done within a reasonable time. Here, as far as the word “wilful” went, the certificate may be said to have been

(a) *Ante*, p. 77.

made at the trial, and the subsequent addition seems to have been made upon further consideration. I think that a judge need not certify before he takes another case. He surely may take time to consider; and can it be said he ought to postpone every other cause until he has made up his mind? Such a course would be unreasonable and very inconvenient.

1841.

PAGE

v.

PEARCE.

ALDERSON, B.—I am of the same opinion. The question is, whether the undersheriff has exercised his right to certify within a reasonable time? I cannot see here what time he has taken, or that he has taken any at all; it is uncertain at what time he did certify, but it might have been done after the adjournment of the Court. I think that may be done. The act cannot be construed literally without taking away all power of deliberation. The true meaning is, that the judge, or other officer, must certify within a reasonable time, with reference to the circumstances.

GURNEY, B. and ROLFE, B., concurred.

Rule discharged.

INGLISS and Another v. HAIGH.

ASSUMPSIT for work and labour, and commission, money lent, money paid, and for interest.

Plea. The Statute of Limitations.

Replication. That long before the accruing of the causes of action, the plaintiffs and defendant were, and continued and still are, merchants, and all that time carried on the trade of merchandize, and that the causes of action accrued in a course of dealing carried on between the plaintiffs and defendant, as merchant and merchant, and were items in an open unsettled account between them as such merchants, and which said accounts contained various items in favour

The exception in the Statute of Limitations, (21 Jac. 1, c. 16, s. 3,) as to merchants' accounts does not apply to an action of *indebitatus assumpsit*, but only to the action of account, or, *semble*, to an action on the case for not accounting.

1841.
 INGLIS
 and Another
 v.
 HAIGH.

of the defendant, and the balance due on which the plaintiff sought to recover.

Rejoinder. That no item on either side of the account accrued due within six years before the commencement of the suit, and that more than six years before the commencement of the suit, the plaintiff had stated the said account to the defendant, as the balance thereof mentioned in the replication.

Demurrer and joinder.

Martin, in support of the demurrer. First, the exception in the 21 Jac. 1, c. 16, prevents that statute from operating with respect to accounts between merchant and merchant, and it makes no difference whether the form of action be assumpsit or account. The words of the act are, "that all actions of trespass, detinue, actions for trover, and replevin, for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, &c.," shall be sued within the several times prescribed in the act. It should be observed, that when the action of account is spoken of, the singular number is used; but when allusion is made to accounts between merchant and merchant, it is in the plural. The true construction of the section, then, is, that all actions on the case are barred, except such actions on the case as concern accounts between merchant and merchant. The argument of *Saunders* in *Webber v. Tivill* (a), supports that view of the case. [*Parke*, B.—If debt were brought, it would not be within the exception, which shews, that the intention of the legislature was, that it should apply only to such claims as formed the subject of an action of account.] It was formerly considered that assumpsit could not be maintained upon an account consisting of numerous items.

(a) 2 Saund. 125.

Farrington v. Lee (a), *Scott v. Mackintosh* (b); but it has since been held, that the balance may be recovered in assumpsit, notwithstanding the account is made up of several items, *Tomkins v. Willshear* (c). The law is correctly deduced in the note to *Webber v. Tivill*; where it is said, "It appears, from the authorities, that the law is now taken to be, that the exception in the statute applies to actions on the case, and the distinction is, that where there have been mutual current and unsettled dealings and accounts between the parties, and any of the items are within six years, the plaintiff, to a plea of the statute, that the defendant did not promise within six years, may reply generally that the defendant did so promise; and the reason seems to be, because the mutual accounts between the parties for any item for which credit has been given within six years, are, of themselves, evidence of there being such an open account, and of a promise to pay the balance." In *Catling v. Skoulding* (d), Lord Kenyon says, "I take it to have been clearly settled as long as I have any memory of the practice of the Courts, that every new item and credit in an account given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained, and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute." The cases in equity would seem to contradict that opinion, *Welford v. Liddell* (e), *Martin v. Heathcote* (f), *Jones v. Pengree* (g), *Bridges v. Mitchell* (h), *Barber v. Barber* (i), but as it was always considered that the Statute of Limitations did not apply to trust estates, it is probable that those cases were decided upon some equitable principle, and not upon the strict legal construction of the statute. But, secondly, the rejoinder does not shew that any account was

1841.

INGLISS
and Another
v.
HAIGH.

(a) 1 Mod. 269 ; 2 Mod. 311.

(b) 2 Campb. 238.

(c) 5 Taunt. 431.

(d) 6 T. R. 189.

(e) 2 Ves. Sen. 400.

(f) 2 Eden, 169.

(g) 6 Ves. 580.

(h) Gilb. Eq. Rep. 224.

(i) 13 Ves. 286.

1841.
 INGLISS
 and Another
 v.
 HAIGH.

stated between the plaintiff and defendant. In order to constitute an account stated, there must be a statement of some certain amount of money being due. *Hughes v. Thorpe* (a). A mere statement by one party not agreed to by the other, is not sufficient. In both *Farrington v. Lee*, and *Webber v. Tivill*, there was a count on an account stated. The statute has, in later times, received a more liberal construction. It was formerly held, that the exception as to merchants' accounts extended only to merchants trading beyond sea, and not to inland merchants, *Sherman v. Withers* (b); and the reason given by the Court for this decision in *Farrington v. Lee* is, that if an action of assumpsit for goods sold, and on an insimul computasset be not barred, then the exception would extend to all actions between merchants and their factors, as well as to actions of account. The dictum of Lord Holt, in *Chevely v. Bond* (c), "that by the exception in the statute concerning merchants' accounts, no other actions are excepted, but actions of account" was extrajudicial. *Rhodes v. Smethurst* (d), and *Smith v. Brown* (e), were also referred to.

Montague Smith, contra. The exception in the statute does not apply to actions of indebitatus assumpsit. The contrary opinion has arisen from confounding the exception of merchants' accounts with the doctrine of acknowledgment of the previous items. The plain construction of the statute is, that actions of account, &c., are barred, except such actions of account as concern the trade of merchandize. *Webber v. Tivill* is an express authority to that effect. In *Martin v. Delboe* (f), which was a special assumpsit, *Twisden, J.*, says, "I never knew but that the word accounts in the statute, was taken only for actions of account; and it appears from a report of the same case in *Keble* (g), that

(a) 5 M. & W. 656.

(b) 1 Chan. Cas. 152.

(c) 1 Show. 341.

(d) 4 M. & W. 42.

(e) 6 Taunt. 340; 2 Marsh. 41.

(f) 1 Mod. 70.

(g) p. 717.

the plaintiff prayed leave to discontinue, on payment of costs, in order that he might bring an action of account. *Farrington v. Lee*, and *Chevely v. Bond* are also authorities for the position contended for. In *Godfrey v. Saunders*(a), the plaintiff declared in account. Other authorities are collected in *Comyn's Digest*, tit. "*Temps*," (G 6), and *Bac. Abr.* tit. "*Limitation of Actions*," (E). The above cases are only impugned by the note to *Webber v. Tivill*, which has been referred to, and the dicta of Lord *Kenyon* in *Catling v. Skoulding*, and *Cranch v. Kirkman* (b), but it is clear that the latter cases were not actions relating to merchants' accounts, and the true ground of those decisions was, that the items for which credit had been given within six years, were evidence of an open account and of a promise to pay the balance. [*Parke, B.*—It is very improbable that the Legislature should have meant to include indebitatus assumpsit within the exception, for that form of action was hardly established when the statute passed, I believe the first instance on record, is that of *Slade's case*, in the reign of Elizabeth.] There is reason why the exception should be confined to actions of account, for in those actions auditors examine both sides of the account, while, in assumpsit one side only is investigated. *Robinson v. Alexander* (c), is in favour of the defendant; in *Foster v. Hodgson* (d), Lord *Eldon*, after referring to the authorities, concludes with a doubt. Secondly, the rejoinder shews a statement of account, and no item within six years. [*Parke, B.*—But it ought to have appeared that it was agreed to by the other side.]

1841.
 INGLISS
 and Another
 v.
 HAIGH.

Martin replied.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court. This was an action of indebitatus assumpsit, the four first

(a) 3 Wils. 73.

(b) Peake, N. P. 121.

(c) 8 Bligh, 352.

(d) 19 Ves. 180.

1841.

INGLISS
and Another

v.
HAIGH.

counts being for work and labour, money lent, money paid, and for interest to these counts, the defendant pleaded the Statute of Limitations, and the plaintiff replied, that he and the defendant were both merchants, and that the causes of action in the four first counts of the declaration arose in a course of dealing carried on between the plaintiff and the defendant, as merchant and merchant, and were items in an open unsettled account between them, as such merchants, and which said accounts contained various items in favour of the defendant, and the balance due on which he, the plaintiff, sought to recover in the present action. The defendant rejoined that no item on either side of the account accrued due within six years, and that more than six years before bringing the action, the plaintiff had stated the said account to the defendant, as the balance thereof mentioned in the replication to this rejoinder. There was a demurrer, and joinder in demurrer, and the question for our decision is, whether, on these pleadings, the plaintiff is entitled to recover? We think he is not. The plea of the Statute of Limitations is a complete bar, unless the plaintiff, by his replication, could take the case out of its operation; he attempts to do so, by bringing it within the exception in the statute, as to merchants' accounts, but we think that exception does not apply to an action of indebitatus assumpsit for the several items of which the account is composed, or for the general balance, but only to a proper action of account, or perhaps also an action on the case for not accounting. Although there is no reported case expressly covering the present, yet there are many coming near it, and in which the dicta of very eminent judges fully warrant the view we have taken of the subject. *Webber v. Tivill* (a) was an action of indebitatus assumpsit for goods sold and delivered, and money had and received, and on an account stated; the plea was the Statute of Limitations. Replication, that the money sought to be recovered, became due, and payable on

(a) 2 Saund. 124.

trade between plaintiff and defendant as merchants, and wholly concerning the trade of merchants; the replication was held bad; and *Morton*, J., said, "that no action but an action of account was excepted," the reporter, it is true, adds, that the other judges said nothing thereto, but gave a judgment for the defendant without assigning their reasons; and certainly in that case, as one part of the demand was on an account stated, and even the residue did not appear to have accrued due, in a course of mutual accounts, it was not necessary to go the full length of what was said by *Morton*, J. So in *Martin v. Delvoe* (a), *Twisden*, J., is reported to have said, "I never knew but that the word accounts taken in the statute was taken only for actions of accounts;" that case, however, was an action of assumpsit on a promise to pay a certain sum out of the proceeds of goods sent to the defendant as a merchant beyond sea, and the Court, doubting whether it appeared on the declaration or not, to be on an account stated, gave leave to discontinue, so that the question whether the statute applied to actions of account only, was not decided. The same observation applies to the case of *Farrington v. Lee* (b), in that case, however, three of the judges were of opinion that the exception in the statute applied only to actions of account. In none of these cases, did the facts necessarily call for a decision whether the exception did or did not at all apply to the action of assumpsit, still the dicta of the judges in those cases are entitled to great weight, unopposed as they are by any conflicting authority whatsoever. But, independent of authority, we are of opinion that the reasonable construction of the statute recognises such a restriction, as the dicta of the judges in the cases we have referred to clearly sanction: the words are, "all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants." Now, as was said by *Scroggs*, J., in the case of *Farrington v.*

1841.
 INGLISS
 and Another
 v.
 HAIGH.

(a) 1 Mod. 70; 1 Vent. 89. (b) 1 Mod. 269; 2 Mod. 311.

1841.
INGLISS
and Another
v.
HAIGH.

Lee, if the Legislature had meant to include in the exception other actions than actions of account, the language would probably have been "other than such an action as concerned the trade of merchandize," and not "other than such accounts;" indeed, it is difficult to say that an action of indebitatus assumpsit for goods sold and delivered, or for money had and received, can, under any circumstances, be described as an action having any reference to accounts; it would have been still more difficult to say so, at the time when the Statute of Limitations was passed. When a merchant plaintiff brings an action for goods sold and delivered, money paid, or any of the other items which may constitute his demand against the merchant defendant, with whom he had had mutual dealings, he is rather repudiating, than enforcing accounts; indeed, by the comparatively modern statute of set-off, the defendant may now have the benefit of his counter demand, but that was not the case at the date of the Statute of Limitations, and we must construe the statute now as it ought to have been construed immediately after it became law. At that time there was no proceeding at law, by which mutual demands could be set-off against each other, but actions of account, and, consequently, there were no other actions in any manner connected with accounts properly so called. It does not at all vary the case, that the plaintiff seeks only to recover what he calls the balance due on the account; if that balance has been stated and agreed to, then all the authorities shew it is altogether out of the exception; if it has not been stated and agreed to, then it is only what the plaintiff chooses to call a balance, the accuracy of which the defendant had, at the time of passing the Statute of Limitations, no means of disputing in an action of assumpsit. Our view of the case is much assisted by considering that the exception clearly would not apply to the action of debt brought for the very same demand, and it is difficult to believe that the Legislature could have intended to preserve the right in one form of action but to bar it in another. The statute is unfortunately worded loosely, and great

latitude has been adopted in construing it; for instance, the saving clause, in cases of disability, section 7, does not, in terms, mention any actions on the case, except actions on the case for words, and yet it has always been held to extend to all actions on the case, from the manifest inconvenience of a contrary construction, *Chandler v. Vilett* (a); and if, in holding that the exception as to merchants' accounts is confined to actions of account, we are doing any violence to the literal construction of the statute (which now we do not feel to be the case,) we are certainly deviating far less than was done, by holding that the words "action on the case for words" in the 7th section apply to all actions on the case whatever. We are aware that in thus confining the exception to actions of account, we are in some measure acting in opposition to what is represented to be law by Mr. Serjt. *Williams*, in one of his very learned notes to the case of *Webber v. Tivill*. In note 7, he seems to represent the exception as extending to actions on the case, as well as actions of account, but on examination, it will be found that the authorities to which he refers, although the language of the judges on the subject is not very distinct, are not, in fact, cases at all depending upon the exception as to merchants' accounts, but are merely cases of mutual running accounts, extending over a space of far more than six years before the commencement of the action, but in which there have been items within that period, though the latter items, recognized as part of the current account, have been taken in many cases, as amounting to an admission that the whole account is open, and something due, and this, before Lord *Tenterden's* act, the 9 Geo. 4, c. 14, was sufficient to take the case out of the statute, not on the exception as to merchants' accounts, but because the adoption of the latter items was held to amount to a new promise to pay the old balance due on the account, over whatever period of time it might

1841.
 INGLISS
 and Another
 v.
 HAIGH.

(a) 2 Saund. 120.

1841.
 INGLISS
 and Another
 v.
 HAIGH.

extend. This distinction is adverted to by Lord *Kenyon*, in *Catlin v. Skoulding* (a), and there can be no doubt that this latter kind of exception out of the operation of the statute arising from the existence of items in a current account within six years before action brought, applied to actions of assumpsit, and also to actions of debt, but the cases in which that doctrine has been acted on here, proceeded on principles wholly independent of the exception as to merchants' accounts, and do not appear to us to afford any support to the notion that that latter exception can be applied to an action like the present. Our opinion being that the replication is bad, it is, perhaps, not absolutely necessary for us to say anything as to the rejoinder by which the defendant seeks to get rid of the replication, by saying that all the items of the account are of more than six years' standing. We think it, however, right to say, that in giving judgment for the defendant, we proceed solely on the insufficiency of the replication, and not on the rejoinder. Whatever doubt might have existed formerly on the question whether the exception as to merchants' accounts applied to accounts in which there has been no item on either side for more than six years, that seems to us now to be entirely set at rest by the decision of the House of Lords in *Robinson v. Alexander* (b), that was a case brought by appeal from the Court of Chancery, being a case of merchants' accounts, in which there had been no item on either side, for a period greatly exceeding six years previous to the filing of the bill. The defendant, by his answer, insisted on the Statute of Limitations as a bar to the account sought by the bill, and there is no doubt it would have been a bar if the exception as to merchants' accounts is confined to cases where there has been some item of account within six years. His Honor, the Vice Chancellor, held the case to be within the exception of the statute, and the House of

(a) 6 T. R. 193.

(b) 8 Bligh. 352.

Lords, after taking time to consider, affirmed the decree of his Honor. We have adverted to this only for the purpose of shewing that our judgment proceeds not on the ground of there having been no item of account within six years, but solely on the ground that the exception in the statute is inapplicable in such an action as the present. Judgment must, therefore, be for the defendant.

1841.
 INGLISS
 and Another
 v.
 HAIGH.

Judgment for Defendant.

DIXON v. THOROLD.

MONTAGUE CHAMBERS moved for leave to sign judgment on a scire facias for default of appearance, upon an affidavit, which stated, that the defendant had called at a house at Hoddesdon, and was told by a female he found there, and who represented herself to be the defendant's housekeeper, that he, the defendant, was somewhere in London, and that she could not account for his absence, except that he was avoiding legal process : whereupon he left the notice with her. He contended, that it was sufficient to shew that the defendant was concealing himself, in order to avoid his creditors.

Lord ABINGER, C. B.—That is sufficient. You may sign judgment.

Rule granted.

Where a notice of scire facias was left with a person who represented herself to be the defendant's housekeeper, and who stated that the defendant was somewhere in London, and that she could not account for his absence, except that he was avoiding legal process, the Court granted a rule to sign judgment for non-appearance.

1841.

*Serjeants' Inn Hall, 4 May, 1841, before PARKE, B.
and ALDERSON, B.*

PEWTRESS and Others v. ANNAN.

The time of delivering out a fiat in bankruptcy as an operative instrument, is "the date and issuing" within 2 & 3 Vict., c. 29, and, *prima facie*, the time of delivering it out of the Bankrupt Office is that time.

A docket was struck, and a fiat bespoke and paid for at twelve o'clock. About two the bankrupt's goods were seized under a *fieri facias*. On the same day, but after the seizure, the fiat was called for, and obtained from the Bankrupt Office. It did not appear whether it had been, at any previous time delivered out to the petitioning creditor or any person on his behalf: *Held*, that the execution was protected by 2 & 3 Vict., c. 29.

THIS was an issue under the Interpleader Act, to try the validity of an execution as against the assignees of the defendant, who had become bankrupt. The parties consented to state a special case, and to abide by the decision of *Alderson, B.*

The case was as follows: The plaintiffs are wholesale stationers, in Gracechurch Street, in the city of London. The defendant is a printer, residing in Watling Street, London. The defendant being indebted to the plaintiffs in the sum of 639*l.* 8*s.*, and being pressed for the payment of it, on the 7th day of December, 1840, executed a warrant of attorney, authorizing the plaintiffs to enter up a judgment against him, for the sum of 1278*l.* 16*s.*, with a defeazance thereon, indorsed for the payment of the said sum of 639*l.* 8*s.*, the debt due to the plaintiffs, with lawful interest, on the 7th day of January, 1841. The warrant of attorney was duly registered on the 11th day of December, 1840. On the 20th day of February, 1841, the defendant became bankrupt, by beginning to keep his house with intent to defeat or delay his creditors. On the 8th day of March, 1841, the plaintiffs entered up judgment upon the said warrant of attorney, and sued out a writ of *fieri facias*, directed to the sheriffs of London, requiring them to levy upon the goods and chattels of the defendant, the sum of 623*l.* 6*s.* 9*d.*, due to the said plaintiffs upon the said judgment, with interest thereon, at 4*l.* per cent. per annum, from the 8th day of March, 1841, with 18*s.* costs of execution, besides poundage, officers' fees, &c. The judgment was so signed between the hours of eleven and twelve o'clock on Monday, the 8th day of March, and the writ of *fieri*

facias, lodged at the Secondaries' Office, in Basinghall Street, at twelve o'clock at noon, the warrant on this writ was directed to John Edward Whittle, an officer of the said sheriffs of London, who, at fifteen minutes before two of the clock in the afternoon of the same day, levied the execution upon the defendant's goods, at his house, in Watling Street, and left a man in possession. On the same 8th day of March, twelve o'clock at noon, a docket was struck against the defendant, upon the petition of James Battersbee, of Croydon, in the county of Surrey, Gentleman, and a fiat bespoken and paid for, and in the afternoon of the same day, but after the said execution had been levied, the fiat was called for and obtained from the Bankrupt Office. The fiat was dated the 8th day of March, 1841. After the execution had been levied, viz. between the hours of five and six in the afternoon of the same day, the following notice was served on the said sheriffs, and on the man in possession, under the said warrant. "To the sheriffs of London, their secondaries, officers, bailiffs, and all others, to whom it doth or may concern. I hereby give you notice, that a fiat in bankruptcy, granted on the petition of James Battersbee, of Croydon, in the county of Surrey, Gentleman, bearing date the 8th day of March, 1841, hath been duly issued against Wm. Annan, of No. 46, Watling Street, in the city of London, Printer, &c., that the same fiat is grounded on an act of bankruptcy previously committed by the said Wm. Annan, and the said fiat will be opened and prosecuted immediately. And I hereby give you further notice to withdraw from the possession of the goods, chattels, and effects seized by you, under the execution issued against the goods and chattels of the said Wm. Annan, and you are hereby required not to sell, or otherwise part with the same. And I hereby give you further notice, that in case you sell, or otherwise part with, or dispose of the said goods, chattels, and effects, seized as aforesaid, an action will be commenced against you for so doing. Dated this 8th day of March, 1841.

1841.

PEWTRESS
and Othersv.
ANNAN.

1841.
PEWTRESS
and Others
v.
ANNAN.

Robert Russell, No. 11, Wellington Street, London Bridge, Southwark. Solicitor to the Fiat."

It is not alleged that the plaintiffs had any previous notice or information of an act of bankruptcy, docket, or fiat. The said fiat was opened, and the defendant was duly adjudged a bankrupt upon the said act of bankruptcy on the 9th day of March, 1841, and on the same day, one of the messengers of her Majesty's Court of Bankruptcy took possession of the premises of the said defendant in Watling Street aforesaid, and for and on behalf of the assignee of his estate and effects claimed the said goods and chattels so seized by the said sheriffs as the goods and chattels of the said assignee. Alexander Bymer Belcher and the said James Battersbee were duly chosen and appointed, and now are the assignees of the estate and effects of the said defendant. On the 18th day of March, 1841, a judge's summons, requiring the plaintiffs and the assignees of the defendant to shew cause why they should not appear and state the nature and particulars of their respective claims to the goods and chattels seized by the sheriffs of London, under the writ of fieri facias issued in this cause, and maintain or relinquish the same, and abide by such order as might be made herein, was attended on behalf of the plaintiffs and the assignees of the defendant, and the sheriffs of London, and the following order was made by the Honorable Mr. Baron *Alderson*: "Upon hearing the counsel of the plaintiffs, and attorneys or agents for the assignees of the defendant, and for the sheriffs of London, and upon reading the affidavit of John Edward Whittle, I do order that the goods seized under the fieri facias herein, be sold by the said sheriffs; and the money brought into Court, deducting the expenses of the sale by the said sheriffs, and that then the said sheriffs be discharged; and that if the parties will consent to a special case, let them state it; and if not, I order that an issue be tried, whether at the time the execution levied, the execution was valid as against the assignees of the defendant, that the assignees be the plaintiffs, and the execution creditors defendants." The

plaintiffs and the assignees of the defendant agree that the Honorable Mr. Baron *Alderson* shall dispose of the merits of their claims, and determine the same in a summary manner, and they further agree that the question for the opinion of his Lordship, on the facts above stated, is,

Whether, at the time the execution was levied, it was valid against the assignees of the defendant? If his Lordship shall be of opinion in the affirmative, he will direct that the money paid into Court, under the said order, shall be paid to the plaintiffs, but if in the negative, then to the assignees of the defendant. It came on for argument, before *Parke*, B., and *Alderson*, B., at Serjeants' Inn.

Dowling, for the assignees. The assignees, in this case, are entitled to have judgment. The words of the 2 & 3 Vict., c. 29, are "Whereas by an act passed in the sixth year of the reign of his late Majesty, king George the Fourth, intituled 'an act to amend the laws relating to bankrupts', it was, among other things enacted, that all payments, really and bonâ fide made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor), should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and bonâ fide made to any bankrupt, before the date and issuing of the commission against such bankrupt, should be deemed valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt, had not, at the time of such payment to such bankrupt, notice of any bankruptcy committed: and whereas by an act passed in this present session of parliament, intituled, 'an act for the better protection of purchasers against judgments, crown debts, lis pendens, and

1841.

PEWTRESS
and Othersv.
ANNAN.

1841.
PEWTRESS
and Others
v.
ANNAN.

fiats in bankruptcy, it is, amongst other things enacted, that all conveyances by any bankrupt, bonâ fide made and executed before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons, to whom such bankruptcy so conveyed, had not, at the time of such conveyance, notice of any prior act of bankruptcy by him committed: and, whereas, it is expedient, that further protection should be given to persons dealing with bankrupts, before the issuing of any fiat against them: be it therefore, enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into, before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, bonâ fide executed or levied before the date and issuing of the fiat shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of the executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution, founded on a judgment on a warrant of attorney or cognovit given by any bankrupt, by way of such fraudulent preference." In the first place, even if the word "issuing" stood alone in this act, 2 & 3 Vict. c. 29, it sufficiently appears from the case, that the fiat had issued before

the execution was levied, or at least the contrary is not shewn by the execution creditor. And, secondly, the words "date and issuing" are conclusive, because, even admitting the execution to have been levied before the issuing of the fiat, it cannot, on the facts stated in this case, in any sense, be said to have been levied before its "date." As to the first point, no substantial distinction can be pointed out between the phrase "issuing" in the present act of 2 & 3 Vict. c. 29, and the phrase "sued forth" in the general bankrupt act of 6 Geo. 4, c. 16, s. 6, as to which latter phrase it has been expressly decided by the Court of Review, and afterwards by the Lord Chancellor, on appeal, that the fiat is to be considered as "sued forth," at the time when the application for it is made of the petitioning creditor, and docket struck, although the fiat has not been delivered out by the officer (a). Also in *Watkins v. Maund* (b), it was held, by Lord *Ellenborough*, that where a commission of bankrupt had passed the great seal, although it was never opened or acted upon, it had issued within the meaning of the 49 Geo. 3, c. 121. The same doctrine may be collected from *Ex parte Freeman* (c), and *Wydown's case* (d). It would be presuming laches in the Lord Chancellor, to conclude that the fiat had not been issued, when everything was done by the petitioning creditor to entitle himself to have it issued; and as the presumption must be the other way, that the Lord Chancellor performed his duty, by issuing the fiat at the proper time, it rests upon the execution creditor to rebut that presumption, by shewing that it was not, in fact, issued, till a later period. Secondly, at all events, the introduction of the word "date" is decisive of the question. In the 81st section of the 6 Geo. 4, c. 16, (which this act of 2 & 3 Vict., c. 29, was passed, to amend,) the words used, with regard to executions, are, "all executions, &c., bonâ fide executed or levied more than two calendar months before the issuing of such commission;" and in the

1841.

PEWTRESS
and Others
v.
ANNAN.

(a) *Re Rowe*, 4 Deac. 68.

(b) 3 Campb. 308.

(c) 1 Rose, 380.

(d) 14 Ves. 91.

1841.
 PEWTERESS
 and Others
 v.
 ANNAN.

act, 2 & 3 Vict., c. 29, the words used are, "executed or levied before the date and issuing of the fiat." Some meaning must be given to the word "date," and the only obvious way of making sense of it is, by holding that it means the day of the date, and that in order to entitle an execution creditor to the benefit of the act, the execution must have been levied at some time on the day before that on which the fiat is dated. This will exclude many nice and troublesome questions as to a fraction of a day. The case of *Godson v. Sanctuary* (a), may be cited on the other side for some of the dicta in it, but on the view which was taken by *Taunton, J.*, and on which the case was decided, it is not opposed to the construction contended for by the assignees. That such is the proper view of the case, appears from the authorities collected in *Com. Dig.* tit. "*Temps.*" (A). It is also to be observed, that the assignees, in this case, represent the general body of creditors, whose right to the property seized in execution becomes vested by relation at the time of the act of bankruptcy, and the law will not take notice of the fraction of a day for the purpose of defeating a vested right. [*Parke, B.*—That is assuming the question, whether any right was vested in the assignees at the time of the execution being levied.] It is not shewn by the case, that the execution was, in point of fact, levied before the "date and issuing of the fiat," and it was for the execution creditor, who claims the benefit of the act, to bring his case clearly within its terms.

Willes, for the execution creditors. The only difficulty, in this case arises from the use of the word "date," as to which two questions arise. One is, whether it means the day of the date, which, it is submitted, it clearly does not. It has no necessary connection with any day, though for shortness sake, the day of the date is, in ordinary language, sometimes called the date. It merely means the particular

(a) 4 B. & Ad. 255; 1 Nev. & Man. 52, S. C.

time and place, at which an instrument is given or delivered. This meaning was adopted in *Armitt v. Breame* (a). Then, secondly, if date does not mean day of date, does it mean anything antecedent to issuing? Clearly not. The recital of the 2 & 3 Vict., c. 29, first speaks of date and issuing, and then in a subsequent sentence, of issuing only. Also in the 81st section of the 6 Geo. 4, c. 16, the term "date and issuing" are used in the first clause, and "issuing" only, in the last, evidently in the same sense. The same observation applies to the previous bankrupt code, in which "issuing" and "date" are used indiscriminately. The 49 Geo. 3, c. 121, s. 2, and 46 Geo. 3, c. 125, exemplify this position. Besides, the word "date" is certainly susceptible of the same sense as "issuing," and, therefore, to reconcile the words, it should be taken to be used in that sense. Therefore, the question now appears to be brought to this, "What is the issuing of the fiat?" It is submitted, that the true meaning of the word "issuing," is delivery out of the custody of the Lord Chancellor, as a perfect instrument to the petitioning creditor, or some person on his behalf, and not merely the affixing of the Chancellor's or Master's signature; and this construction of the word appears to be consistent with the expressions of the Lord Chancellor, in the course of the argument in *Wydown's case* (b), and of Lord Ellenborough, in *Watkins v. Maund* (c). Also in *Ex parte Freeman* (d), although the great seal had been actually affixed to the commission; it was considered to be in fieri, while it remained in the hands of the Lord Chancellor. As to *Re Rowe* (e), that case was decided on quite a different section and form of expression from that which occurs in the present case. It was on the 6th section, which requires the commission to be "sued out," within two months after declaration of insolvency. Sir John Cross and

1841.

PEWTRESS
and Othersv.
ANNAN.

(a) 2 Lord Raym. 1076.

(b) 14 Ves. 89.

(c) 3 Campb. 308.

(d) 1 Rose, 380.

(e) 4 Deac. 68.

1841.
 PEWTRESS
 and Others
 v.
 ANNAN.

the Lord Chancellor, in their judgments, both take the distinction between "suing out" and "issuing" the fiat, the former being the act of the party in applying for the fiat, the latter the act of the Court, in granting it. This distinction is also clearly pointed out by the Lord Chancellor in *Wydown's case*, already cited. Applying these observations to the present case, it appears that the "suing forth" of the fiat was before the execution levied, but that the "date and issuing" of the fiat, was after the levy. The execution creditor is, therefore, entitled to retain the amount of the levy. [*Alderson*, B.—Is there any authority as to taking notice of fractions of a day in such a case as the present?] Yes! *Thomas v. Desanges* (a), and *Godson v. Sanctuary* (b). The latter case seems, in one view of it, to be decisive in favour of the execution creditor, though it certainly may be explained on grounds which do not affect the present case. He was then stopped by the Court.

PARKE, B.—There must be judgment for the execution creditor. The time of delivering out the fiat from the hands of the Lord Chancellor to the petitioning creditor, or some person on his behalf as an operative instrument, is the "date and issuing" within the act; and, *primâ facie*, the time of delivery out of the Bankrupt Office is that time. Only one such delivery out is stated in the case, and that too late, and we cannot intend that there was a previous one, in order to defeat the execution.

ALDERSON, B.—The Bankrupt Office must, in fact, be considered as the office of the Lord Chancellor for this purpose, and the delivery out of the Bankrupt Office to the petitioning creditor, or some person on his behalf, is, *primâ facie*, the "date and issuing" of the fiat. If there was any previous delivery to any person on behalf of the petitioning

(a) 2 B. & Ald. 586. (b) 4 B. & Adol. 255; 1 Nev. & Man. 52, S. C.

creditor, the assignees should have shewn it. We cannot presume that there was any such delivery. Therefore, I agree that there must be judgment for the execution creditor.

1841.

PEWTRESS
and Others

v.
ANNAN.

Judgment for the execution creditor (a).

(a) GURNEY, B., had expressed a similar opinion in a case of *Tarquand v. Evill*, tried at the Nisi Prius Sittings, at Westminster, on the Friday previous, but in that case the assignees having proved the time when the fiat issued, and the execution creditor not having offered any evidence of the time of levying the exe-

cution, Gurney, B., directed the jury that they might presume, from the absence of such evidence, that it had not been levied before the date and issuing of the fiat, and there was a verdict for the assignees. *Erle, Platt, and Cleasby* for the plaintiffs. Sir *F. Pollock, Kelly, and Willes* for the defendant.

COURT OF COMMON PLEAS.

Trinity Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1841.

Ex parte WITTY and SALT.

The certificate of the acknowledgment of two married women taken under the 3 & 4 Wm. 4, c. 74, stated them to have acknowledged the execution of indentures of lease and release; they were parties only to the indentures of release: The Court, upon motion, refused to order the amendment of the certificate.

TALFOURD, Serjt., moved for leave to amend the certificate of the acknowledgment of two married women, taken under the 3 & 4 Wm. 4, c. 74. The certificate purported that they had acknowledged the execution of indentures of lease and release; they were parties only to the indenture of release. [*Tindal*, C. J.—How can we order the amendment after the fact is certified and sworn to?] The case might be considered analogous to that of *Evans* dem. *Davies and Wife, defendants* (a), where the Court ordered an amendment of the roll, by an indorsement of the proclamations of a fine, at the Court of Great Sessions in Wales, under the 11 Geo. 4, and 1 Wm. 4, c. 70.

TINDAL, C. J.—The cases are not at all analogous.

MAULE, J.—If the Court were to grant the application it would in effect order the alteration of an affidavit.

Motion refused.

(a) *Ante*, vol. 7, p. 259; S. C. 5 Bing. N. C. 229, and 6 Scott, 372.

1841.

Ex parte ALICE SHAW.

TALFOURD, Serjt., moved that the affidavit of verification of the acknowledgment of Alice Shaw, a married woman, made in pursuance of the 3 & 4 Wm. 4, c. 74, and of the rule of H. T., 4 Wm. 4 (a), might be received. The proceedings were regular, except in the title, and commencement of the affidavit of acknowledgment, which were as follow:—

“ Commonwealth of
Pennsylvania,
City of
Philadelphia,
to wit. } Be it remembered, that on the 10th
day of December, 1840, came before
me, Thomas Binns, Esquire, Alder-
man of Philadelphia, Commonwealth
of Pennsylvania, John Slack, &c.,
and in due course of law deponed and sworn, &c.”

The document then went on in the ordinary form of an affidavit, the words “and this deponent further saith” being occasionally introduced. The affidavit was signed by the deponent, and was stated to be “sworn and subscribed before me, Thomas Binns.” It was accompanied by the usual notarial certificate. The objection raised by the officer of the Court was, that it was not in exact compliance with the form given in the rule of Court, H. T., 4 Wm. 4. By one of the provisions of that rule, it was declared, “that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary.” [*Tindal*, C. J.—This certainly seems a very unnecessary alteration in the form prescribed.] It was, however, a mere formal alteration, and the document was as much an affidavit, as if it was drawn up in the exact words pointed out by the rule.

The affidavit verifying the acknowledgment of a married woman, taken in Philadelphia commenced as follows: “Be it remembered that on the 10th of December, 1840, came before me, T. B. Esq., Alderman of Philadelphia, &c., J. S. &c., and in due course of law, deponed and sworn, &c. :” it then proceeded in the form of an affidavit, was subscribed by the deponent, and was accompanied by the usual notarial certificate. The Court directed the affidavit to be received, although it was not in exact compliance with the rule of H. T., 4 Wm. 4.

TINDAL, C. J.—The document at first would seem to be

(a) *Ante*, vol. 2, p. 789.

1841.

ALICE

v.

SHAW.

a mere recital that John Slack was sworn, but afterwards it assumes the form of an affidavit, and as it is accompanied by the certificate of a notary public, I think it may pass.

Fiat.

—♦—
Ex parte BRUCE.

The Court will not dispense with the affidavit of a married woman herself, upon an application under the 91st section of the 3 & 4 Wm. 4, c. 74, for an order for the conveyance of the property of the wife, without the concurrence of her husband.

LUDLOW, Serjt., moved that Elizabeth Bruce might be permitted to convey her interest in a certain estate, without the concurrence of her husband, under the provisions of the 3 & 4 Wm. 4, c. 74, s. 91. The married woman herself made no affidavit, but the affidavits of two other persons were produced, one of whom stated the bankruptcy of the husband, while the other deposed to his disappearance from his home in the month of December, 1840.

TINDAL, C. J.—That will not do. The 91st section of the statute expressly provides that the concurrence of the husband shall be dispensed with only upon the application of the wife. We have already decided, that the affidavit of the wife is necessary to negative communication with her husband (*Ex parte Mary Williams*) (a), for it by no means follows that she does not know where her husband is.

Ludlow, Serjt., urged that the delay of the long vacation would be highly inconvenient to the parties, and that there would not be time to procure the affidavits of the wife (the motion being made on the last day of term), and the Court directed the order to be made, but not to be taken out of the office until the affidavit of the wife was produced.

Granted on those terms.

(a) *Ante*, p. 72.

1841.

DUNN v. DI NUOVO.

THIS was an action to recover the sum of 163*l.* 16*s.* for rent in respect of the use and occupation of apartments by the defendant in the plaintiff's house. The first count of the declaration stated, that by an agreement dated the 25th February, 1839, made between the plaintiff and defendant, certain rooms and apartments, part of the messuage in the occupation of the plaintiff, were let by him to the defendant, at the weekly rent of 3*l.* 3*s.*, with an additional weekly charge of 4*s.* for coals, for the term of twelve months, from the said 25th February, with option to the defendant to give up the same at the expiration of eight months; that the defendant entered and became possessed, &c., on the day and year aforesaid, and continued in possession for fifty-two weeks, until and upon a certain day, to wit, the 24th February, 1840, when a large sum of money, to wit, the sum of 163*l.* 16*s.*, became due and was payable from the defendant to the plaintiff, whereby, &c. There was also a second count upon an account stated.

The defendant pleaded, secondly, as to so much of the first count as related to the non-payment of so much of the rent claimed to have accrued due before and on the 27th day of July, 1839, that the plaintiff ought not to have or maintain his suit, because, &c., payment in full satisfaction and discharge: Verification.

Demurrer, assigning for cause, that the said plea, secondly above pleaded, was not pleaded with sufficient certainty; that the defendant did not shew, with sufficient certainty, to how much of the rent, claimed by the first count, the plea was intended to apply; that the defendant should have shewn, by a specific allegation in that behalf, the number of weeks in respect of which the rent mentioned in that plea, and to which that plea was intended to apply, accrued due; that the defendant ought not to have left it to the Court to estimate the amount of rent

The plaintiff declared for 163*l.* 16*s.* being the amount of rent claimed to be due in respect of the use and occupation of apartments in his house by the defendant, for one year, at a certain weekly rent from the 25th of February, 1839, to the 24th of February, 1840. The defendant pleaded as to so much of the rent claimed as accrued due, "before and on the 27th of July, 1839," payment.

Held, that the plea was uncertain, the period between the 25th of February, and the 27th of July, being twenty-one weeks and five days, and, that the words "and on" could not be rejected so as to render the plea applicable only to the period of twenty-one weeks.

1841.

DUNN

v.
DI NUOVO.

as to which the plea was pleaded, or the number of weeks in respect of which the rent accrued due; and also, for that the introductory part of the plea should have stated the amount in moneys numbered, of that part of the rent to which the plea was intended to apply.

Channell, Serjt., in support of the demurrer. The plea did not ascertain, with sufficient certainty to what portion of the declaration it was intended to apply; but the defendant should have disclosed, with greater precision, the amount which it was intended to cover, and the period in respect of which that amount was due. It was left to the plaintiff to conclude what was the proper meaning to be applied to the allegations made; but he might misapprehend the intentions of the defendant. In *Com. Dig.* tit. "*Pleader*," (E 27), it was laid down, "If a plea goes only to part, it must ascertain the part of the declaration to which it is applied; as in debt for rent for several years, if the defendant says, quoad 20*l.*, parcel of rent, nil debet, and does not shew when the rent was due." Looking at the calendar, it would be seen that the time from the 25th Feb. to the 27th July, was twenty-one weeks and five days; but as no rent could accrue on the last-named day, the plaintiff was left in uncertainty whether the odd days were intended to be recovered or not.

Manning, Serjt., in support of the plea. The rejection of the words "and on" from the plea would render it intelligible, and these might be rejected as surplusage. The plea would then appear to allege the rent to have accrued due before the 27th July, which might be on the 22nd July, which would be the termination of a week. [*Maule*, J.—You cannot avail yourself of the fact of repugnancy; because for anything that appears there might have been an apportionment of rent, so as to make it really due on the 27th July. *Tindal*, C. J.—If it were as you suggest, the plaintiff might insist that he was entitled to have the very day stated up to which you rely on payment. But is not your

plea also open to this objection, that you say nothing as to the rent due subsequently to the 27th July, 1839? The plaintiff claims an account accruing due in 1840.] That was not an objection on demurrer; but the plaintiff should have signed judgment for want of a plea. *Com. Dig.* tit. "*Pleader*" (C 21).

1841.
DUNN
v.
DI NUOVO.

TINDAL, C. J.—I do not think that we have any right to reject the words "and on" as surplusage, especially as the plaintiff has shewn us that in consequence of some arrangements between the parties the specific defence is left in doubt. The plea seems to say, that up to a certain day the defendant has paid the rent; but the plaintiff saying that there is an uncertainty as to the meaning intended to be conveyed, he has a right to put the defendant out of Court.

The rest of the Court concurred.

Judgment for the Plaintiff.

Ex parte SUSAN STONE.

CHANNELL, Serjt., moved for an order to dispense with the concurrence of the husband of the applicant, Susan Stone, to the deeds of conveyance of certain property under the 3 & 4 Wm. 4, c. 74, s. 91. The affidavits disclosed the following facts:—Mrs. Stone, under the will of her father, became entitled to the fee simple of one-sixth part of a messuage in Oxford. In or about the month of February, 1841, her husband absconded from his dwelling-house, at Oxford, to avoid being arrested, and came to London; but after having remained there until the 30th of March, on that day he sailed, in the capacity of surgeon, on board an

In support of an application for an order to dispense with the concurrence of the husband of a married woman to the deeds of conveyance of certain property, under the 3 & 4 Wm. 4, c. 74, s. 91, it was sworn that the husband had absconded from home, and had since sailed for Port Philip;

that since the departure of the ship, his wife had heard nothing of him, and that she believed him to be on his said voyage; that her husband had been made a bankrupt, and that her interest in the property in question passed to his assignees, and, also, that her husband, having sold the property, she was desirous of completing the conveyance: *Held*, sufficient.

1841.

Ex parte
SUSAN
STONE.

emigrant ship for Port Philip, New South Wales. The affidavit of Mrs. Stone further stated, that she had not since received any letter from him; that she was ignorant whether he was living or dead; and that she did not believe him to be in the United Kingdom, but on his said voyage to Australia. The affidavit then went on to allege, that the husband of the applicant, before he so absconded, caused to be sold her interest in the estate to which she was entitled, and that she was now desirous of completing the sale. It also stated that a fiat in bankruptcy had issued against her husband, and that assignees had been appointed, to whom her beneficial interest in the property passed.

TINDAL, C. J.—All that you want is, *valeat quantum*. Let the order be made.

—◆—
Doe dem. GIBBARD v. ROE.

Service in ejectment upon a lunatic tenant is good service, on which to obtain judgment against the casual ejector. After repeated attempts to serve the tenant in possession, a copy of the declaration was left at his house on the day before Term. On the first day of Term a letter was received from his attorney, dated the preceding day, acknowledging the receipt of the copy of the declaration;

SHEE, Serjt., moved for judgment against the casual ejector. The premises were in the possession of two persons; namely, Mrs. Moss and Mr. Northhouse. Mrs. Moss was a lunatic, confined in an asylum; in a conversation with her son, it was ascertained that no committee had been appointed, and he suggested that the service should be effected upon her personally, in the asylum, in which she was confined, and this was accordingly done. [*Tindal*, C. J. That will do (a).] With regard to the case of Mr. Northhouse, the affidavits disclosed repeated unavailing efforts to effect personal service on him; and they also stated, that

(a) *Doe v. Wright*, Barnes, 190; title, 1 B. & P. 385; Vide, also *Doe d. Aylesbury v. Roe*, 2 Chit. Rep. 183; *Goodtitle v. Bad-* *Doe d. Brown v. Roe*, ante, vol. 6, p. 270.

Held, sufficient to raise a presumption that it had reached the hands of the defendant on the day before Term.

on the 21st May, (the day before Term) a copy of the declaration was left at his house, which was the premises in dispute. On the next day, a letter was received from his attorney, which was dated the 21st May, and in which it was admitted that the declaration had then reached his hands.

1841.
 Doe dem.
 GIBBARD
 v.
 ROE.

TINDAL, C. J.—Putting all the circumstances together, there is reasonable ground to suppose that the declaration came to his possession on the 21st May, the day before Term.

Rule granted.

CURTIS v. RICKARDS.

TALFOURD, Serjt., moved for the discharge of the defendant, a prisoner, under the provisions of the 48 Geo. 3, c. 123, s. 1. The sum for which the prisoner was in custody, was 20*l.* 5*s.*, which had been recovered by a judgment. The debt had originally amounted to 27*l.* 5*s.*, but had been reduced by the payment of 7*l.* on account, before judgment. The prisoner was now prepared to shew upon affidavit, that by previous payments, the amount of the debt in reality, was below 20*l.* [*Maule*, J.—That might have been shewn at the trial.]

Where on an application to discharge a prisoner out of custody under the provisions of the 48 Geo. 3, c. 123, s. 1, for a debt exceeding 20*l.*, the prisoner proposed to shew, by affidavit, that the debt had been reduced below 20*l.*, before action brought: the Court refused to entertain the motion on that ground.

TINDAL, C. J.—We cannot make the order for the discharge of the prisoner.

Motion refused.

1841.

F. T. WEST, Executor of JOHN WEST, v. BLAKEWAY.

The plaintiff declared in covenant, and the declaration alleged the making of a lease in the lifetime of J. W., of whom the plaintiff was surviving executor, by which certain premises were demised to the defendant for a term, covenants being contained in the instrument to repair and maintain all erections and improvements on the demised premises, and to surrender and yield up the premises with all such improvements, &c., being well and sufficiently maintained, &c.; breach, alleging the making of a green-house, which was an erection and improvement on the premises, and its removal before the yielding up of the premises. The defendant pleaded that he assigned the

premises to one T. J. B., who assigned them to J. P., who assigned them to W. H., and that it was agreed between the testator and the said W. H., and the said testator then promised the said W. H., that if he would make and set up a certain improvement, to wit, a green-house, in and upon the demised premises, he should be at liberty to pull down and remove the same: Replication, de injuriâ. At the trial of the cause, the jury returned a verdict for the defendant on the issue, but assessed conditional damages to the plaintiff. Upon motion for judgment non obstante veredicto; Held, that the plea was ill, as setting up a parol agreement to vary a contract under seal.

COVENANT. The declaration stated that John West, in his lifetime, and before and at the time of the making, &c., was lawfully possessed of the tenements, &c., for the residue of a certain term of years; and being, &c., he did, on the 30th May, 1818, by an indenture made between John West of the one part, and the defendant of the other part, (profert) demise and lease to the defendant a certain messuage, with the outhouses and gardens thereto belonging, to have and to hold to him, his executors, &c., for 21 years, &c.; and the defendant for himself covenanted with John West among other things, that he would well and effectually repair and uphold, support, sustain, maintain, and keep the said messuage and tenements, walls, &c., and all erections and improvements, which, during the said term, thereby granted, should be erected, made, or set up, in and upon the said premises, or any part thereof; and the said demised premises and every part thereof, and all such buildings and improvements as aforesaid being so in all things well and sufficiently repaired, upheld, &c., at the end, or other sooner determination of the said term, peaceably would leave, surrender, and yield up to the said John West, his executors, &c., together with the several fixtures, &c.; by virtue of which demise the defendant entered into and upon the said demised premises, &c., and became thereof possessed, &c. The title of the plaintiff as surviving executor under the will of John West was then set out, and the declaration went on to allege that nevertheless the defendant did not nor would, from time to time, &c., repair, uphold,

maintain, and keep, &c., all the erections and improvements, which, during the said term thereby granted, were erected, made, and set up in and upon the said demised premises, &c.; nor did leave the same premises, &c., so in all things sufficiently repaired, &c., but on the contrary thereof, &c.; and also, that the defendant suffered and permitted a certain erection and improvement, to wit, a certain green-house, which, during the said term had been erected, made, and set up, and was then standing, and being in and upon the said premises, &c., to be, and the same was then pulled down and prostrated, and the materials therefrom coming, wholly removed, contrary, &c., by means whereof, &c.

The defendant pleaded four pleas: first, denying the erection of the green-house; secondly, that he had not permitted the said green-house to be pulled down and prostrated, nor the materials to be removed modo et formâ; thirdly, that after the making of the indenture in the declaration mentioned, and the time therein mentioned, and before the committing of the grievances alleged, and in the lifetime of the deceased John West, to wit, &c., the defendant by his deed poll (profert) granted to T. J. B., his executors, &c., the said premises, with the appurtenances, to hold during all the then residue of the said term so to him, the defendant, demised: that the said T. J. B., in like manner, assigned the same to one J. P., who, in like manner, assigned to W. H., who assigned to William Hicks, who entered and became possessed: and the said William Hicks being so possessed, and the said immediate reversion being in John West, it was agreed between them, and the said John West then promised the said William Hicks, that if the said William Hicks would make and set up a certain erection and improvement, to wit, a green-house in and upon the said demised premises during the continuance of the said term, he, the said W. Hicks, should be at liberty to pull down and remove such green-house at the expiration of the said term, provided no injury was done to the said demised premises by the removal of the said green-house: that after-

1841.
WEST
v.
BLAKEWAY.

1841.
 WEST
 v.
 BLAKELAW.

wards, during the continuance of the said term, and during the lifetime of the said John West, the defendant William Hicks confiding in the agreement and promise of the said John West, did set up and make such erection and improvement, to wit, the said green-house, in the said breach of the said covenant mentioned, in and upon the said demised premises; and further, in pursuance of the said agreement and promise, he did, afterwards, and at the expiration of the said term, pull down and remove the said green-house from off the said demised premises, &c.: Verification. Fourthly, the defendant paid 72*l.* 3*s.* into Court, and pleaded that the plaintiff had not sustained damage further than to that amount.

Replication, taking issue on the first and second pleas; de injuriâ to the third plea; and to the fourth plea alleging that the plaintiff ought not to be barred, because he had sustained damage to a greater amount than 72*l.* 3*s.* Issue.

The cause was tried at Guildhall at the sittings after Easter Term, 1840, when a verdict was found for the plaintiff upon the first, second, and fourth issues, with 35*l.* damages, and for the defendant on the third issue; but conditional damages were assessed on the third issue, the jury declaring that 90*l.* was the amount of damage sustained by the plaintiff in that respect, in the event of his being entitled to recover upon the breach alleged.

Talfourd, Serjt., in the following Trinity Term, moved for a rule, calling upon the defendant to shew cause why judgment should not be entered for the plaintiff on the third issue with 90*l.* damages, notwithstanding the verdict found by the jury. He contended that the defence set up by the third plea was insufficient, upon the general principle that a contract under seal could not be varied by a parol agreement. *Thompson v. Brown*, (a) *Heard v. Wadham*, (b) *Rex v. Bingham*. (c)

(a) 7 Taunt. 656.

(b) 1 East, 619.

(c) 3 Yo. & Jer. 101.

Bompas, Serjt., and *Chilton*, in the following Easter Term shewed cause. The question involved in this case was not so broad in its character as had been contended on moving for the rule; and the proposition that a specialty could not be varied by a parol agreement was too well established to be doubted. But the present case must be viewed as if Hicks, the assignee of the lease, had been the agent of the testator, who was the original lessor, and had removed the green-house by his authority. The present defendant had no power to interfere between them as to any agreement they might choose to make, and the person of whom the plaintiff was executor having deprived himself of an advantage which he might have derived from a third party, it would be unjust in the extreme to call upon the present defendant to satisfy that executor for the mischief arising from the testator's act. [*Tindal*, C. J.—Would it have been a sufficient answer to this declaration to say, that the testator gave permission to the defendant to remove the green-house? And can there be any distinction drawn between the case of the defendant and of his assignee?] In *The City of London v. Greyme*, (a) the Mayor and Citizens of London covenanted to find eight men to grind every day in Bridewell Mill, which they let to the defendant, and agreed that if they failed therein, the defendant should retain so much out of his rent. The defendant pulled down the corn-mill and made it a horse-mill, and would not defalk so much out of his rent as he ought to have allowed for the eight men. But all the Court held, that, by the alteration of the mill, the lessors were discharged of their covenant, and that the conversion was waste, although it was for the lessors' advantage. [*Tindal*, C. J.—I do not see how anything which was done by the lessor prevented the defendant from doing that which he was bound to do under the lease.] The answer set up was tantamount to an allegation that the lessor had removed the green-house himself, because it al-

1841.
WEST
v.
BLAKEWAY.

(a) Cro. Jac. 181.

1841.
 WEST
 v.
 BLAKEWAY.

leged the authority of West to Hicks, with sufficient formality to render the plea a good one upon an objection non obstante veredicto. [*Tindal*, C. J.—No doubt the lessor might have authorized the removal of the green-house, but could he do so otherwise than by a sufficient instrument?] Whatever was an excuse for the non-performance of a condition, might be an answer to an action for the non-performance of a covenant; and there were many cases where it had been held that the obligor himself having caused the failure of the condition, could not take advantage of his own wrongful act. *Co. Litt.* 206 b. *Com. Dig.* tit. “*Condition*.” (L 6). The authorities there cited shewed that where the lessor caused the non-performance of a condition, he could not take advantage of the breach; and also that he could not take advantage where he was the means of the non-performance. These principles had been carried even further in the cases of *Ratcliff v. Pemberton*, (a) and *Doe d. Winckley v. Pye*, (b) for the effect of those decisions was, that where a person, having title to premises in the possession of another, stood by and saw the tenant exercise acts of complete ownership, by making alterations inconsistent with his own right, and permitted such acts to be done, it was evidence for the jury to decide whether he did not mean to be bound by them, as an assertion of right, *Doe d. Knight v. Rowe* (c) and *Doe d. Sore v. Eykins*, (d) carried out the same principle.

Talfourd, Serjt., and *Swann*, in support of the rule. The doctrine contended for on the part of the defendant, if allowed to prevail, would make a great inroad upon that principle which had been repeatedly so broadly laid down, that a contract under seal could not be varied by a parol agreement. This was a case in which the merits did not at all come before the Court, but which must be decided in obedience to those general principles of law which were so

(a) 1 Esp. 35.

(b) 1 Esp. 364.

(c) 2 Carr. & P. 246.

(d) 1 Carr. & P. 154.

well established, and which, for the convenience of one instance, could not be departed from. The case of *Harris v. Goodwyn* (a), bore a strong analogy to that now before the Court, and, undoubtedly, if any argument upon the merits could have prevailed where a question of law only was to be decided, it should there have been taken into consideration. The fallacy in the argument on behalf of the defendant consisted in the contention, that the defence set up amounted to an allegation, that the act was done by the testator, West, at the time when the green-house was removed. It was, in truth, a statement of an executory contract, in pursuance of which the act was done; and in order to support the plea, it must be maintained that the covenant was varied by the parol agreement, at the time that agreement was made. The defendant himself could not claim the benefit of such an agreement as was set up, if the allegation was, that it had been made between him and the lessor; and could he derive any advantage from the circumstance of its having been made with a third person, who was his assignee? If such an argument were to prevail, all contracts under seal might be got rid of by a little circuitry, and so the established principles of the law might be evaded. The authorities which had been cited, did not, in truth, shake the proposition which was contended for on the part of the plaintiff. Those which went to shew that a party, who was prevented from performing a contract by the act of the obligor, could not be sued for the non-performance of the covenants, referred to his immediate interference, and not to any agreement which he might appear to enter into, or to any proposition to which he might be supposed to assent. In the case of *Ratcliff v. Pemberton*, an action of covenant was brought on a charter-party, and the defendant offered evidence that the plaintiff had waived a condition in the deed by parol; and all that could be collected from that case was, that Lord *Kenyon* would not unneces-

1841.
 WEST
 v.
 BLAKEWAY.

(a) *Ante*, p. 409.

1841.

WEST

v.
BLAKKWAY.

sarily lay down the rule, that license could not be given in evidence to vary the covenant. *Doe d. Winckley v. Pye* had no bearing upon the present case.

TINDAL, C. J.—This is an action of covenant, brought by the surviving executor of the lessor against the original lessees; and the breach of the covenant, on which the suit is founded is, that the lessee having agreed that all erections and improvements, which, during the term, should be set up on the demised premises, should be left upon them and yielded up at the end of the term; a certain green-house, which was an erection and improvement, was set up, but was pulled down, and the materials carried away. The answer set up is, that the term and interest created by the lease, vested by an assignment in one Hicks; and that while Hicks was such assignee, and in the possession of the premises in question, an agreement was entered into between the original landlord and Hicks, by which, in consideration that Hicks would erect, make, and set up a certain erection and improvement, to wit, a green-house on the demised premises, the said Hicks should be at liberty to pull down and remove the said green-house at the expiration of such term, provided that in so doing, he did not injure the premises. The question now before us, it having been found by the jury at the trial, that the plea was proved in point of fact, is, whether the plaintiff is entitled to judgment non obstante veredicto? The ground upon which the plaintiff rests his case being, that the plea contains no legal answer to the declaration; and the question, therefore, arises, as if on demurrer, for our decision. It appears to me, on the best consideration which I am able to give the case, that the plea contains no legal answer to the covenant alleged in the declaration. I agree, that if the plea did amount to that, on which, on the argument, it has been left, to an assertion that the lessor himself had actually occasioned the breach, it would have been a good answer; not on the ground of any agreement between the parties,

but that in fact it would shew that the breach had not been occasioned by the lessee, but was the act of the lessor himself. But on looking at the terms, in which the plea is conceived, I think that it does not amount to anything more than an allegation of a mere parol promise on the part of the lessor, that the green-house erected by the assignee might be carried away by him. There is no principle better established, than that a deed can be discharged only by a deed. *Solvere eodem ligamine, quo ligatur.* If authority be wanted for this, the case of *Rogers v. Payne* (a), sufficiently establishes it. That was an action of covenant, and the breach assigned was the non-payment of money; the defendant pleaded a discharge in the nature of a release, without deed, in satisfaction of all demands. Upon demurrer, it was objected that the plea was ill, for that a covenant to pay money which is by deed, cannot be discharged without deed; and so it was held by the Court. On looking at the books various other cases may be brought forward, but it is a principle so simple and well acknowledged, that it cannot be doubted. The way in which it strikes me, that this cannot be a good plea is this; that if an action were brought by the lessor against the assignee, the assignee could not have set up this parol promise that he might remove the green-house, because it would be a violation of the rule which I have pointed out. Then, if the action is not brought against the assignee, but is brought against the original lessee, how can it be an answer in the mouth of the latter, when it would have been none in the mouth of the assignee, to whom the promise was given? The argument derived from the case of a condition being waived or excused by the acts of the parties themselves, does not necessarily apply to cases of covenant under seal. If the condition of a bond is rendered impossible by the act of the obligee, or by anything occasioned by means of the

1841.
WEST
v.
BLAKEWAY.

(a) 2 Wils. 376.

1841.
WEST
v.
BLAKEWAY.

obligee, there is no doubt an action cannot be maintained in respect of it. But let us see the difference between the two cases. In the case of a bond the obligation is under seal, but the condition is stated to be performed or not, and may rest on evidence only; and, therefore, if a condition is placed in a bond for the benefit of the obligee, it is matter which may become the subject of evidence before a jury. But in the case of a covenant, where the obligation is under the seal of the party, any answer set up of permission of the covenantor, should be of necessity of the same value and nature as the covenant on which the suit is brought. The cases, therefore, do not agree. If it could be maintained as it was argued, that this amounts to an act done by the covenantee himself, I should agree that this was a good plea. The case then would amount to the ordinary case of a bond, where the plea is, that if the party has suffered damnification, he has done so by his own act. But this brings us back to what I have before stated, that this is only a parol promise, authority, or license given by the landlord to the assignee of the lessee, which, not being of the same value in the estimation of the law as the covenant by which the lessee is bound, cannot be set up in answer to an action brought against him. The rule, therefore, must be absolute.

BOSANQUET, J.—I am of opinion that the third plea pleaded to this declaration offered no answer to that part of the covenant of the breach of which the plaintiff, the original covenantor, complains as against the defendant, the original covenantor. Nothing is more clearly established in law than that a contract entered into under seal, cannot be varied or dispensed with, except by an instrument of equal value, and that it cannot be varied by any parol contract where its performance is excused by any contract not under seal. I agree with what has been suggested in argument, that if a covenantee prevents a covenant being performed by any act of his own, it is an answer to the action, but the act in that case

should be immediately done by the covenantee himself. What is the case here? The performance of the covenant was not prevented by any act of the covenantee, but a parol agreement is alleged to have been entered into between the covenantee and Hicks, that if Hicks will build a green-house, the covenantee will allow him to take it away. Afterwards, at the expiration of the defendant's lease, this action is brought against the covenantor by the covenantee for the breach of the covenants of the lease. The cases which have been cited do not materially bear upon the question. The only one on which it is necessary to make any observation is that of *Doe d. Knight v. Rowe*. There, an expression is reported to have fallen from Lord *Tenterden*, then Chief Justice *Abbott*, and everything which has fallen from him must, of course, be received with the greatest respect, which led me to suppose that he had said something which is contrary to the doctrine which I have understood to be long established,—that if a covenantee has by his acts led the defendant to suppose that he was doing all that was expected of him, the action of covenant could not be maintained. That was not, strictly speaking, an action of covenant, but of ejectment. The covenant was to insure at two-thirds of the value of the premises, and not for any specific sum. It was proved, in the course of the case, on the part of the plaintiff, that the premises were worth 1700*l.*; but for the defendant contradictory evidence was adduced, shewing that the value was 1200*l.* The premises were insured for 800*l.*, precisely two-thirds of that sum, and then there was the additional fact, that the plaintiff had insured the same premises at the same office for the same amount of 800*l.* I cannot help thinking that the language of the Chief Justice then must be taken in this way, that considering the nature of the evidence, it was reasonable for the jury to think that the defendant had done enough, and that the defendant had insured them for as much as was the fair value of the premises. This seems to me to be the fair re-

1841.

WEST

v.

BLAKEWAY.

1841.
WEST
v.
BLAKEWAY.

sult of that case; and more especially when the Chief Justice said that he was of opinion that there had been no dispensation. Then what was done in that case did not amount to a dispensation, but evidence was offered to the jury to show that the defendant had done enough.

COLTMAN, J.—I cannot consider that in this case the matter stands otherwise than it would have done if the defendant himself had been the person to whom this alleged promise was made. The fallacy here, is to suppose that there was any act done by the lessor to prevent the execution of the covenants. The mere license of the lessor to the assignee of the lease to remove the green-house, did not compel the party to do so, but left it optional with him, and that being the view of the case, it falls within the principle of the cases which have been cited.

ERSKINE, J.—The only defence disclosed by this plea is, that the removal of the green-house, which is complained of, took place with the assent of the plaintiff, and under an agreement which he made with the assignee of the lease. The question is, whether this plea, setting up a parol agreement, is a sufficient answer to the declaration, by which a covenant under seal is alleged? It is admitted that this would not be a good defence in an action against Hicks, and I cannot see how it can afford a better defence for the original lessee. It seems to me, that this case comes within the principle of *Thompson v. Brown*, where a party gave a covenant to deliver goods at a certain place, and a parol agreement was afterwards entered into to deliver them elsewhere, and it was held, that that would not dispense with the original contract under seal.

Rule absolute.

1841.

BLEADEN *v.* RUPALLO.

GASELEE, Serjt., moved for a rule, calling upon the plaintiff in this action to show cause why the first count in the declaration should not be struck out.

The plaintiff declared, as Secretary to the Commercial Steam Packet Company, and the declaration alleged, that on the 6th July, 1840, in consideration that the said company, at the request of the defendant, had let to hire to and furnished for the defendant's use, a steam vessel of the said company, of great value, &c., to go anywhere he or his friends pleased, at and for a certain reward, to be therefore paid by the defendant to the said company for the same; the defendant then promised the said company, whilst the said steam vessel was so let to hire to him as aforesaid, to take due and proper care of the same, and not to use the same in any illegal or unlawful manner, or for any illegal or unlawful purpose, and the defendant then had the use of the said steam vessel for the purpose aforesaid. Yet the defendant, not regarding his said promise, afterwards, and whilst the said steam vessel was so let to hire, &c., and whilst he had the use of the same, to wit, on the 6th August, in the said year, did not take due and proper care of the said vessel, and used the same in an illegal and unlawful manner, and for an illegal and unlawful purpose, in this, to wit, that the defendant then used the said steam vessel in and about, and for the purpose of raising and levying war and insurrection and rebellion against the king of the people of the kingdom of France, then and still being at peace and in

The plaintiff declared as secretary to the Commercial Steam Packet Company, and in the first count of his declaration alleged, that in consideration of the company supplying the defendant with a steam vessel for hire, to go where he and his friends pleased, the defendant undertook and promised while the steam vessel was so let to hire to him, that he would take due and proper care thereof, and not use the same in any illegal or unlawful manner, or for any illegal or unlawful purpose: yet the defendant disregarding his said promise, afterwards and whilst the said steam vessel was so let to hire to him, did not take due and proper care, thereof,

&c., but used the same for raising and levying war and insurrection and rebellion against the king of the French: The second count alleged that an agreement was entered into between the plaintiff and defendant, by which the former agreed to provide a steam vessel for the use of the defendant, for one month, &c., and the latter agreed not to detain the same from him for more than one month; it then alleged that the steam vessel having been supplied, the defendant detained the same for a long space of time, to wit, 100 days beyond the month, &c.

Held, that those counts were not in violation of the rule of H. T., 4 Wm. 4, which provides that several counts shall not be allowed unless a distinct subject matter of complaint is intended to be established in respect of each.

1841.

BLRADEN
v.
RUPALLO.

amity with our lady the now queen, and in pursuance of and for that purpose caused and procured the said steam vessel to be navigated and directed, and the same then was, by the master and crew of the said vessel, navigated and directed, into the dominions of the king of the French aforesaid; and then and there, without the knowledge or consent of the said company as aforesaid, landed and disembarked out of the said steam vessel divers soldiers, &c., for the purpose of levying war, &c., against the said king; whereby the said steam vessel, together with the tackle and apparel thereof, became and were liable to be seized and detained, and the master and crew thereof became and were liable to be imprisoned by the said king, &c. The declaration then alleged the seizure and detention of the vessel, until the 13th Nov., 1840, and the imprisonment of the master and crew until the same date, whereby the said company for and during all that time lost and were deprived of the use of their said steam vessel, and of the said master and crew, their servants, and of all the profits, freight, benefits, and advantages that would have otherwise arisen and accrued to them: and further stated, that the company had been put to great expense in and about providing for and maintaining the master and crew, and in procuring their discharge, and in and about obtaining the restoration of their vessel, and the prevention of its confiscation.

The second count stated, that whereas also, heretofore, to wit, on the said 6th July, 1840, by a certain agreement then made by and between the said company and the defendant, it was agreed that the said company should provide a steam vessel for the defendant's use, and let it to him for one month to go anywhere he and his friends pleased; that he was to give two days' notice when he required the vessel, and in consideration whereof the defendant agreed with the said company to pay them 100*l.* a-week from the day and year last aforesaid to the 6th August then next, or in the event of his not using the vessel he agreed with the said company to

pay 100*l*. for the option of the use of it, &c. : and the defendant then agreed with and promised the said company not to detain or cause or procure the said vessel to be detained from them beyond the space of one month ; and the plaintiff avers that the said company, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year first aforesaid, provide a steam vessel of the said company for the defendant's service, and the having given the said company notice that he required the same, they did then let it to him, and he had the same for one month to go anywhere he and his friends pleased, &c. : yet the defendant, not regarding his said agreement and promise, did cause and procure the said vessel to be detained from the said company beyond the said month for which the vessel was so let to the defendant as aforesaid, to wit, for the space of one hundred days beyond that month, in parts beyond the seas, to wit, in the kingdom of France and elsewhere ; whereby the said company for and during all that time lost, and were deprived of the use of the said steam vessel, and lost and were deprived of the profits, gains, and advantages which, during that time, they might and otherwise would have derived and acquired from the use of the same ; and whereby also the said company were, during all that time, put to and incurred, and became and were liable to pay great charges and expenses, &c., in and about the providing for and keeping and maintaining the master and crew of the said vessel, &c.

The third count alleged, that the defendant was indebted to the company for the hiring of the vessel, and there were also counts for money paid to the use of the defendant, for money had and received, and on an account stated.

It was now contended, that the first and second counts of the declaration alleged only one and the same contract, and that the declaration was, therefore, at variance with the rule of Court of H. T. 4 Wm. 4, (*a*) which provides, that "several counts shall not be allowed, unless a distinct subject

1841.

BLEADEN
v.
RUPALLO.

(*a*) *Ante*, vol. 2, p. 312.

1841.

BLEADEN

v.

RUPALLO.

matter of complaint is intended to be established in respect of each."

PER CURIAM.—The contract alleged in the first count is purely collateral to that which is set forth in the second count, and is a contract implied by law. If we refused to allow that count to remain we should cut off from the plaintiff that which may be his greatest cause of action.

Rule refused.

PONTIFEX v. BIGNOLD.

The plaintiff declared against the secretary of an Insurance Company, and alleged the making and publishing of a prospectus, stating certain bonuses to have been declared by the rules of the Company, and that the secretary had represented that prospectus to contain a true account of the affairs of the Company: the declaration having alleged

the breach of several of the rules appointed for the governance of the establishment, averred that the representations of the defendant were false and fraudulent, and that the plaintiff having been induced by those representations to effect a policy of insurance with the company, and to pay the premiums becoming due upon that policy, he had, by means thereof, been defrauded and deceived, in effecting the said policy, and in making the said payments thereon, and the said policy of insurance was of much less value to the plaintiff, than if the said representations of the defendant had been true in substance and in fact, to wit, 1000*l.* of less value, and by means thereof, the plaintiff was likely to lose the whole benefit of his insurance, and the said sums of money so paid by him, as premiums for the same; *Held*, to disclose a sufficient cause of action.

To such a declaration, the defendant pleaded that the rules of the Society had been and were so duly performed, &c., and the funds of the Society had been and were so duly administered as was necessary for the maintenance and security of the said Society, and of such insurances as had been effected: *Held*, ill.

1841.

PONTIFEX

v.

BIGNOLD.

of life and circumstances of fortune, from the establishment of a society, to be composed of such persons as should be qualified and willing to become mutual contributors for equitable insurances on lives and survivorships, upon premiums proportionable to the chance of death, attending the age of the life to be insured, and to the time for which such insurance was to be continued: and for granting and selling annuities for life or lives, to any person or persons for a gross sum in hand paid; that it was then further stated, by the said indenture, that they, the said parties, whose names and seals were thereunto subscribed and affixed, being willing and desirous to procure every of them to themselves respectively, or to their several and respective executors, administrators, or assigns, and to insure to others who should unite themselves with them, the advantages and benefits that might arise, and be had from establishing themselves into a society for effecting equitable insurances on lives and survivorships, &c., did thereby consent, promise, agree, undertake and covenant every of them for themselves respectively, to and with all and every the others of them, to become by mutual contributions, insurers on lives and survivorships, and granters of annuities, and to become members of, and to enter and erect themselves into a society by the name of the Norwich Union Society, or Union Office, for insurances on lives, &c., upon such terms, premiums and conditions, and with and under such constitutions, laws, rules, and regulations as should be thereafter in the said indenture expressed, declared, and provided for, and for such time and term to continue members thereof, as should be signified in the policies of insurance, to be made out and delivered to every of them respectively at the time, and in the manner thereafter for that purpose mentioned; and that for the better forming, fixing, and establishing the said society, and governing and regulating the same, and the proceedings thereof, and the more effectually to make provision for producing and securing to them the several good and beneficial ends and purposes thereby intended, that they, the subscribers to the said in-

1841.
PONTIFEX
v.
BIGNOLD.

denture, consent, and severally covenant, promise, agree and undertake, every of them, for themselves respectively, to and with all and every of the others of them, to observe, perform, abide by, conform to, fulfil, and keep all and singular, the articles, clauses, provisions, agreements, &c., thereafter mentioned and contained; and amongst others, the following, that is to say, that for the more orderly and effectual management of the affairs of the said society, there should, during its continuance, be twenty-four members of the said society, who should be directors thereof, and should so continue during the subsistence of their respective policies, or until they should die, resign, or be removed in the manner thereafter mentioned, and that the trustees of the said society to be chosen as thereafter mentioned, should have power, from time to time, to choose additional directors, as and when such trustees should see occasion, and should also choose such new directors to supply such vacancies in their numbers, as should, from time to time, occur by death, resignation, or otherwise; the declaration then alleged the rules made for the holding a court of directors, in the month of December, every year, to receive and examine the accounts of the society, which should be laid before them by the secretary; for the direction of the affairs of the society by that court of directors, with the assistance of the secretary, six of the directors forming a committee, meeting weekly for that purpose, and having power to receive all applications of persons, desirous of becoming members of, and effecting insurances with, the society, to propose and settle the rates of insurances, &c., and also to determine the requisites and qualifications of the applicants for policies; and then proceeded to recite the further rules; that the said committee should have power to sign, execute, and issue any policy of insurance, or grant of annuity, to order investments in the funds, in the names of the trustees, or any four of them, and to manage and transact all other, the usual and customary business of the said society; that the said committee might,

from time to time, elect, nominate, and appoint such treasurer, solicitor, and agents, to transact the business of the society, as to them should appear meet, and at their will and pleasure might remove such treasurer, &c.; and that they might make such allowance to such treasurer, &c., as they should think proper: That when any vacancy should occur in the said committee by death, resignation, or otherwise, such vacancy should be immediately supplied from amongst the general body of directors, by the votes of a majority of the directors present at a Court, to be summoned for that purpose, &c.: That there should be twenty-four trustees for the said society, who should continue in their situations as trustees, until they should die, resign, or be removed, and that a majority of the directors, who should be present at any Court, to be holden as therein-before mentioned, should have power to choose additional trustees as and when such directors should see occasion, and should also choose new trustees to supply such vacancies in their number, as should, from time to time occur: That all securities taken by the said society should be taken by, and in the names of the said trustees, or by and in the names of any four of them, whom the committee of directors should appoint, any of whom, upon resignation or removal, should immediately surrender up all their estate and interest in any of the said securities; that there should be a secretary to the said society, who should give constant attendance by himself or his clerk, at the house or office of the society, in order to receive the proposals of persons desirous of becoming members of, or being insured in the said society, &c.; that whenever the said office of secretary should become vacant, the directors should immediately elect some person to fill the same. That once in two years, between the month of June and September, the secretary should prepare an account of the state of the society's funds and finances, and should calculate the outstanding risks, &c.; that within one month after the completion of such biennial calculation, a general meeting of the members of the society

1841.

PONTIFEX
F.
BIGNOLD.

1841.
PONTIFEX
v.
BIGNOLD.

should be called, and that if it should appear to such general meeting that the funds of the society were more than sufficient to pay the claims made, or liable to be made upon the society, then the members present at such general meeting should declare a dividend of the surplus, (after reserving one-fifth part of such surplus, which should be funded for the purpose of accumulating and forming a permanent capital, to answer the demands that might be made upon the society, in case of any extraordinary mortality amongst the members), unto and amongst those members who should be insured by and with the society, upon and for the whole duration of life, (those who should have become members in the then current year alone excepted,) in manner following, &c.: And the plaintiff further saith, that afterwards, to wit, on the day and year first aforesaid, a certain society was constituted for the purpose aforesaid, and falsely pretended and assumed to be constituted and conducted according to the deed so recited and set forth in the said publication: and before the committing of the grievances hereinafter mentioned, to wit, on the 1st July, 1831, he, the said defendant, then being and acting as secretary of the said society, did issue, circulate, and distribute for and in the name of the society so falsely pretending, &c., and then called and known by the name of the Norwich Union Life Insurance Society, a certain prospectus or printed statement of the funds and regulations of the said society, and of the bonuses that had been declared, the amount of premium deposited by the members at various periods since the formation of the said society up to the year 1829, which said prospectus, &c., contained, among others, the statements following: that is to say, that the first addition to the sums insured in the said society was made on the 28th June, 1816, when a bonus of twenty per cent. was declared on the amount of premiums deposited by the members insured previous to July 1815: that the second addition, assigned on the 28th July, 1823, was twenty-four per cent. upon all premiums deposited prior to July 1822;

and that the third addition was declared on the 29th August last, and was twenty-five per cent. on all premiums deposited prior to July 1829, making a total addition of 69½ per cent. on all insurances effected prior to 1815; and of 49½ per cent. prior to 1822: And the plaintiff says, that afterwards, and before the committing of the several grievances by the defendant hereinafter mentioned, to wit, on the 9th July, 1831, he, the said plaintiff, then being desirous of effecting an insurance with the said company, &c., did apply to the defendant, so being secretary, &c., for information about the same, and did inquire of the defendant, and request him, the defendant, to inform him, the plaintiff, whether the above recited articles, provisoes, powers, conditions, laws, constitutions, ordinances, regulations, and agreements, contained in the said deed of settlement, as set forth in the said publication, had been duly performed, complied with, observed, kept, and fulfilled, and whether the above recited statements concerning the funds and pecuniary affairs and prosperity and bonuses of the said society, so contained in the said prospectus or printed statement of the funds and regulations of the said society as aforesaid, were true and correct; nevertheless the defendant, well knowing the premises, and that the above recited articles, &c., had not nor had any of them been duly complied with, &c., and that the said recited statements, &c., were not nor were any or either of them strictly true and correct, but contriving, and fraudulently intending craftily and subtilely to deceive and injure the plaintiff in this behalf, on the day and year last aforesaid, falsely, fraudulently, and deceitfully, in answer to the said inquiries so put to him by the plaintiff as aforesaid, did represent and affirm, that the above recited articles, &c., had and each and every of them had been duly performed, &c., and that the above recited statements, &c., were and each and every of them was strictly true and correct; by means and in consequence of which representation, &c., so made and given by the defendant to the said plaintiff as aforesaid, the plaintiff not knowing to the contrary, but

1841.

PONTIFEX
v.
BIGNOLD.

1841.

PONTIFEX
v.
BIGNOLD.

believing, thereupon, that the said society was in the condition and in the circumstances and state so described, &c., by the defendant, and that its affairs were duly, lawfully, and regularly administered and conducted, according to and in conformity with the several above recited articles, &c., afterwards, to wit, on the 11th July, 1831, made and entered into a certain policy of insurance with the said society, on his, the plaintiff's, life, upon the terms therein mentioned, (profert), and paid thereon, according to the terms of the said policy, to the said society, when the same became due, divers sums of money, to wit, &c.; whereas in truth and in fact the said defendant well knew, at the time of making the said representations and affirmations, that the said recited articles, &c., had not been, nor were any of them performed, &c., in this, to wit, that the said trustees had not, nor did choose, new trustees to supply such vacancies in their number as had from time to time occurred by death, resignation, or otherwise, but on the contrary thereof, &c. Breaches of the other rules were then alleged, with regard to the holding of meetings by the directors, for the various purposes of the society; and it was further stated, that the securities taken by the society were not taken in the names of the trustees or any four of them, but that securities to a large amount were taken in the name of the defendant, as secretary; that the defendant so being secretary, had omitted to see that the orders of the directors, with regard to the funds of the society, had been carried out, and that he did not once in two years, between the months of June and September, prepare an account of the state of the society's funds, &c.; that no general meeting of the members of the society was called, as by the deed was required, but on the contrary thereof; although no such meeting was called, and although the funds of the society were not more than sufficient to pay the claims made, or liable to be made, upon the society, yet afterwards, and before the committing of the grievances, &c., to wit, on the 29th August, 1830, a certain dividend of supposed

surplus was declared, &c., without reserving one-fifth part of such surplus to be funded for the purpose of accumulating, and forming a permanent capital to answer the demands that might be made upon the society, in case of any extraordinary mortality amongst the members, &c.; and whereas, in truth and in fact, the said above recited statements concerning the funds and pecuniary affairs and prosperity of the said society, so contained in the said prospectus, &c., were not, each or any of them, strictly true and correct in this, to wit, that the third addition to the sums insured, which was declared, on the 29th August, 1830, of 25% per cent on all premiums, &c., was in truth a false and fraudulent addition, &c.; by means whereof, and of the said false and fraudulent misrepresentation and deceit of the defendant, the plaintiff says that he has been defrauded and deceived in making and effecting the said policy, and in making the said payments of the said premiums from time to time, and the said policy of insurance is of much less value to the said plaintiff than if the said representations of the defendant had been true in substance and in fact, to wit, 1000% of less value, and by means whereof the said plaintiff is likely to lose the whole benefit of his said policy of insurance, and of the said sums of money so from time to time paid by him as aforesaid to the said society as premiums for the same, to the damage of the plaintiff of 3000%., &c. The defendant pleaded several pleas, amongst which was the following: That the said articles, provisoes, &c., contained in the said deed of settlement in the said declaration mentioned, had been and were so duly performed, complied with, &c., and the funds and pecuniary affairs of the said society had been and were so duly regulated and administered as was necessary for the maintenance and security of the said society, and of such insurances as then had been or thereafter might be effected therewith. Verification.

Demurrer. That the said plea is not sufficient in law; for that the said plea, instead of containing a distinct and

1841.
 PONTIFEX
 v.
 BIGNOLD.

1841.
PONTIFEX
v.
BIGNOLD.

certain answer to the several and specific averments on the declaration of breaches and non-performance of the said articles, &c., in the said declaration mentioned, contains only a general statement that the same had been and were duly performed, &c.; and the funds and pecuniary affairs of the said society had been duly regulated and administered, not shewing how or in what manner the same had been kept and fulfilled, or to what particular branch of the declaration the said plea relates, or whether it refers to negative or affirmative provisions, &c., or whether it relates merely to the effect of observing and keeping the said articles, &c., or whether it is intended to allege that they were in fact respectively kept and observed; and also, for that it is alleged in the said plea, that the said articles, &c., were duly performed, &c., and the funds and pecuniary affairs of the said society had been and were duly regulated and administered, thereby, by using the word "duly," raising for the consideration of the jury, a question of law and not one of fact merely; and also, for that the plea is so general and uncertain, that no intelligible issue can be raised or taken thereon; and also, that the plea does not confess and avoid or deny any of the material allegations of the declaration in such a manner that the plaintiff can safely reply thereto; and also, for that if the plaintiff replied thereto, he could only re-state and repeat the breaches already alleged in the declaration; and also, for that the said plea is bad, as being double and multifarious; and also, for that the said plea should have concluded to the country, and not with a verification; and also, for that the said plea is pleaded as if it were an answer to the whole declaration, whereas it is only an answer to part thereof; and also, for that the said plea contains an immaterial traverse, and is in other respects uncertain, informal, and insufficient. Joinder.

The defendant gave notice that he should contend, on the argument on demurrer, that the declaration was insufficient, and disclosed no right of action, inasmuch, as even if the alleged misrepresentations were made, it did not appear

that the plaintiff had sustained any injury thereby, either by the loss of his policy, or by any insecurity in his insurance; that there was nothing in the declaration which connected the alleged misrepresentations with any depreciation in the value of the policy, or which shewed that the insurers were unable or unwilling to satisfy any demand upon them which might arise under the policy, or that the insurance had been abandoned by the plaintiff, or that he had been injured in any respect by effecting it.

1841.
 PONTIFEX
 v.
 BIGNOLD.

Stephen, Serjt., and *Petersdorff*, for the plaintiff. The plea was clearly bad for the reasons stated in the demurrer. It admitted the violation of all the rules of the society, as alleged in the declaration, and did not attempt to deny that the plaintiff had suffered damage; but in point of fact, it amounted to this: true it is that the plaintiff has suffered damage, but he is not much hurt. This was clearly an insufficient answer to the statements in the declaration. It was also an insufficient plea, because, while it purported to be an answer to the whole declaration, in truth it professed to answer only those parts of it, which referred to the funds of the society. Then it was insufficient, as amounting to a denial of damage only, and as containing a mere argumentative denial of the allegations of the plaintiff. The statement was, that the regulations of the society had been violated, but there was neither a denial nor an admission of that fact. *Griffith v. Eyles* (a), had a strong bearing upon the case. Then, as far as the plea amounted to an allegation of performance, it was by far too general, because the plaintiff had no means of replying to it, except by repeating the breaches alleged in the declaration. The defendant's objections to the declaration could not be allowed to prevail. A clear right of action was disclosed, independently of any actual damage sustained. The ground of the action was the affirming by the defendant that certain things were

(a) 1 Bos. & Pull. 417.

1841.
 PONTIFEX
 v.
 BIGNOLD.

true, and thereby causing the plaintiff to become a member of the society; it was no answer to an allegation that the representations were false, and that the plaintiff in consequence would not obtain those advantages which he had a right to expect, that his policy would be paid. *Furnis v. Leicester* (a), *Blofeld v. Payne* (b), *Marzetti v. Williams* (c), *Weller v. Baker* (d). These cases shewed that the possibility of damage was a sufficient ground of action, and the declaration, therefore, sufficiently disclosed damage. *Lyde v. Barnard* (e) was also in point. But if the allegation of damage in the declaration was insufficient, that was an objection which could not be raised now, but which was open to the defendant on special demurrer only. *Pewtress v. Austen* (f), *Trower v. Chadwick* (g), and *Brown v. Jarvis* (h), were also referred to.

Channell, Serjt., for the defendant. It must be remembered that this was not an action of contract, but of tort, and it was a case in which the plaintiff could only recover, by shewing that he had sustained damage by reason of the wrongful act of the defendant. Damage, therefore, was the gist of the action, and the defendant was right in applying his plea to it. All that was stated in the prospectus might be true, but the damage was said to have arisen from the improper declaring of dividends, and so it was sought to charge the defendant for the act of the company. His answer distinctly applied itself to the subject-matter of the declaration, because the complaint being the improper management of the affairs of the society, he said that they had been so properly performed as was necessary for the maintenance of its security. [*Tindal*, C. J.—Do you think that if you had given that answer to the plaintiff when he made the inquiry of you he would have insured?] The

(a) Cro. Jac. 474.

(b) 4 B. & Ad. 410.

(c) 1 B. & Ad. 415; 1 Nev. & Man. 353.

(d) 2 Wils. 414.

(e) 1 M. & W. 101.

(f) 6 Taunt. 522.

(g) 3 Bing. N. C. 334; 3 Scott, 699.

(h) 1 M. & W. 704.

defendant could not be supposed to be required to shew by his plea that everything had been done. [*Maule, J.*—Do you mean to say that the two propositions, that the policy is of less value to the plaintiff, and that the policy is equally secure, are identical? Even that proposition, however, that the policy is as secure as if all the rules of the society had been complied with, does not appear to be raised by your plea. *Erskine, J.*—What object has a man in selecting one office in preference to another, except that of procuring from it something better in the way of bonuses? You distinctly hold out that anticipation by the representations which you make.] The declaration, at all events, could not be sustained. It contained no allegation whatever to shew any insecurity as to the policy. [*Maule, J.*—Supposing a policy as to a horse, which was represented to have two eyes, and to be able to see, and it was found to be blind, would an action for such a cause be answered by a plea that the horse was just as good? *Tindal, C. J.*—In such a case, surely the purchaser of the horse would not be obliged to sell his horse before he brought his action?] That would be a case of warranty. [*Tindal, C. J.*—Does not this case range itself within that class, headed by *Pasley v. Freeman* (a), where actions have been brought, alleging representations to have been falsely made within the knowledge of the party? *Erskine, J.*—Suppose a man bought a horse, which was said to be a good hunter, and it was found not to be so, and he brought his action?] That would be a case of warranty.

TINDAL, C. J.—What is this in effect but a warranty? A man goes to an established officer, from whom he had a right to look for a just and true account of the affairs of the company, and he receives an answer which is not true. I think that the plaintiff is entitled to judgment.

Judgment for the Plaintiff.

(a) 3 T. R. 51.

1841.

PONTIFEX
v.
BIGNOLD.

1841.

FISHER *v.* DUDDING.

The time of "entering up judgment," referred to by the 1 & 2 Vict. c. 110, s. 17, is, that at which the *incipitur* is entered in the Master's book; therefore, where the *incipitur* was entered on the 8th of January, in pursuance of the Master's allocatur, for 630*l.*, but upon subsequent application by the plaintiff, for a review of the taxation of costs, the amount was increased to 643*l.*, by which sum the judgment was amended on the 30th May, the date of the judgment being left unaltered; *held*, that the plaintiff was entitled to interest from the 8th of January, and not from the 30th of May only.

GOULBURN, Serjt., moved for leave to enter up satisfaction on the record in this action, upon the following state of facts agreed upon between the respective parties. On the 8th of January, judgment was signed, the Master's allocatur being for 630*l.* 15*s.* 6*d.* During the progress of the taxation of costs antecedently to that date, a conversation took place between the attorneys of the plaintiff and the defendant, when the latter said that the money would be paid. A day or two afterwards, the plaintiff's attorney called on the defendant's attorney, and said that he should move to review the taxation of costs, but that he was afraid that the defendant would fail in the meantime. The defendant's attorney answered that there was no fear of that, and offered to pay the money immediately, as it was lying idle in his banker's hands. On the 8th of January, a summons was taken out before a learned judge at Chambers, to review the taxation of costs, but the questions which arose upon its hearing were referred to the Court; and there it was suggested by the Master, that if the parties would attend before him again, an arrangement might be made, and the expenses attending the rule saved. This was accordingly done, and on the 20th of May, the allocatur was altered by the amount being increased to 643*l.* 5*s.* 6*d.* The date of the allocatur was not altered, and the judgment remained as of the 8th of January. On the 20th of May, the defendant's attorney paid to the plaintiff's attorney, the sum of 643*l.* 5*s.* 6*d.* by a check, which the latter consented to receive "on account," but the defendant's attorney refused to take a receipt in those terms, and it was thereupon agreed that the payment should be made without prejudice, and that an application should be made to the Court on the part of the defendant to enter satisfaction on the record. The question was, whether the defendant was entitled to

have interest at rate of 4*l*. per cent. under the provisions of the 1 & 2 Vict. c. 110, s. 17, since the 8th of January.

1841.

FISHER

v.

DUDGING.

Bompas, Serjt., shewed cause in the first instance. The 17th section of the 1 & 2 Vict. c. 110, provided "that every judgment debt shall carry interest at the rate of 4*l*. per centum per annum from the time of entering of the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution." The day from which the judgment must be taken to bear date was the 8th of January, and from that day, therefore, it ought to bear interest. The fact of the delay of the final determination of the amount ought to produce no result unfavourable to the plaintiff, because the conclusion which was eventually arrived at must be taken to be the correct one, and he ought to have had the judgment entered on the 8th of January for the sum then fixed. It was the mere case of an amendment by which the plaintiff, who was right, ought not to be prejudiced, and it was to be observed that the defendant, by the adoption of this suggestion, would suffer no hardship, because he had the use of the money during the whole period for which it was kept back from the plaintiff. If the date of the judgment was wrong, it was the duty of the defendant to move to amend it; but at all events the plaintiff ought not to suffer in consequence of an act which was not the result of any proceeding of his own.

Goulburn, Serjt., contra. The words of the statute did not refer to the time of signing judgment, but of entering up judgment, and there could be no doubt that the date of entering up judgment was the 20th of May. The delay of the final determination of the amount of the judgment was not in consequence of any act of the defendant, but it must be taken to have been either the result of the plaintiff's own proceeding in applying to review the taxation, or of the error of the officer, by which neither party ought to

1841.

FISHER

v.

DIDDING.

be hurt. That the defendant would suffer damage if he was compelled to pay interest from the 8th January was clear, because he had distinctly offered to pay the money at an early date, and surely when he made a tender founded on that, which was at the time, the determination of the officer, the Court would not now take a step against him, which in its consequences must be a harsh one. [*Maule, J.*—There is a book kept in the office in which the parties enter what is called an incipitur, and from that entry is made up the judgment, if either of the parties wish it. That incipitur, is, I take it, the “entering up” of the judgment.] That course was, at all events, in this instance, contrary to the justice of the case. [*Maule, J.*—I do not think so. The 4*l*. per cent. is given in consequence of the money being kept out of the hands of the party entitled to it. The defendant has had the use of the money, and surely that is the very case intended to be met by the statute.] The real question was, by whom was the delay caused? because if it had been caused by the plaintiff, the defendant ought not to pay the penalty for it.

TINDAL, C. J.—This is a question upon the construction of the 17th section of the act, which abolishes arrest on mesne process, and we cannot give any construction to its provisions which shall merely satisfy the case now before us, but must construe it in such a manner as shall satisfy the words of the statute, and shall, therefore, be applicable to all cases. The question is, what is the meaning of the words that interest shall be allowed from “the time of entering up judgment?” And it appears to me, that the legal meaning of those words must be taken to be the time of signing judgment, or making the entry of the incipitur in the Master’s book. After that has been done, the plaintiff has two terms allowed him before he closes the record, and when he does that, the Master will put on the margin of the roll the very day on which the incipitur was entered. There may be a distinction, therefore, between

entering up on the roll, and entering up judgment merely. The 14th section of the Statute of Frauds, provides that any one who shall sign any judgment, shall at the signing of the same, set down the day of the month and year of his so doing, which day of the month and year shall also be entered on the margin of the roll. Therefore, it is clear that the day of the signing is the day, as of which the judgment is to be entered on the record, and as that gives operation to the judgment, as to purchasers afterwards, or in cases of death, or of priority against simple contract debts, when the incipitur is stated, as it is here, to have been made on the 8th of January, the judgment must be said to have been entered on that day. I do not feel the force of the argument as to the injustice likely to be worked to the defendant by the loss of interest, because he might have made a tender, and that would have been a good answer to any action which might be brought. According to the construction of my brother *Goulburn*, the judgment is not entered at this moment, because there has been no formal entry on the roll, but we can only refer these words of the statute to that which ordinarily takes place, and that being so, this rule must be refused.

1841.
FISHER
v.
DUDDING.

COLTMAN, J.—I agree that we cannot consider the inconvenience in particular cases in laying down a general rule of practice. I had doubted whether such an amendment as this could be made by the officer, but I think that the original entry must be taken to have been a misprision of the clerk, and that on that ground, therefore, no objection exists. When the judgment is amended, it stands as if it had been originally correctly entered, and the entry contemplated by the act appears to me to be that which is made in the book in the office. The rule, therefore, must be refused.

ERSKINE, J.—In putting an interpretation upon this clause of the statute, we must look at the practice of the

1841.

FISHER
v.
DUDDING.

Court to see what is the "entering up" of the judgment, and it appears to me that the entry of the incipitur in the Master's book must be taken to be that entering up which is contemplated, and although the judgment may be afterwards more formally entered on the roll, yet that is not the entering of the judgment from which interest must be calculated.

MAULE, J.—I am also of the same opinion. In the contemplation of law, entering up of the judgment is the writing down something in a book which is kept by the Master for that purpose. That is called the incipitur, and the entry is only so made for the convenience of the parties, but it guides what is drawn up afterwards in a more formal manner on the record. The record, it is to be observed, is not usually drawn up, unless it is necessary that it should be so for the use of the parties for any particular purpose, and the incipitur, at the same time, that it is generally alone sufficient for all ordinary purposes, affords the materials for drawing up that more minute form on parchment, which on account of the expense, is usually dispensed with. In criminal cases, the same course is commonly pursued, and the record is only filled up in instances where from some circumstances it is requisite that it should be so. The fact of this not being generally done then, affords a clue to the intentions of the legislature, and shews that the statute was not meant to refer to the entering up of the judgment on the roll, which would often produce more expense than the interest would amount to, but to the general entering up of judgment in the Master's book in the form of an incipitur. With regard to the justice of the case, the Court cannot look to particular cases in laying down a general rule of practice; but I confess that I do not see that any injustice will be worked by the decision at which the Court has arrived.

Rule refused.

1841.

DOE d. EDWARDS v. LEACH.

THIS was an action of ejectment to recover possession of premises by reason of a forfeiture, and in the declaration the day of the demise was laid to be the 15th January, 1840, a day antecedent to the date of the right of entry. At the trial before *Parke*, B., in Surrey, at the Spring Assizes, 1841, the declaration was amended by the date of the demise being altered to the 16th January; that amendment was objected to on the part of the defendant, and the learned judge directed the verdict to be entered for the lessor of the plaintiff, subject to the opinion of the Court upon the question, whether he possessed the power to amend under the provisions of the 3 & 4 Wm. 4, c. 42, s. 23.

A rule nisi having been obtained in Easter Term to set that verdict aside, and enter a nonsuit,

Channell, Serjt., now shewed cause. It was clear that the power of amendment under the statute extended to cases of ejectment, for a forfeiture. In the case of *Doe d. Marriott v. Edwards* (a), which was a case of ejectment for a forfeiture, the parish in which the premises were situated was misstated, and an amendment was allowed by the same learned judge, by whom the present case had been tried. The principle of that case was precisely in point. A question might be raised whether the Court would apply the statute to the case of a demise in an ejectment, the whole of the proceedings being fictitious, but it had been a principle acted upon by the Courts, that these fictions should not operate to the prejudice of the parties to suits. *Rowe d. Wrangham v. Hersey* (b). If the Court saw that there was a variance, they were empowered to sanction the amendment, and it was clear that in the present instance there was such

In a declaration in ejectment to recover possession of premises, by reason of a forfeiture, the day of the demise was stated to be the 15th of January. At the trial, it appeared that this was a date antecedent to the day on which the right of entry accrued: *Held*, that this was a case in which the learned judge was authorized under the 3 & 4 Wm. 4, c. 42, s. 23, to amend the record by altering the day of the demise, and that the power of amendment was not affected by the applicability of the consent rule, to confess lease, entry, and ouster, to the declaration as it originally stood, but that the terms of that rule would apply themselves to the declaration as soon as the amendment was made.

(a) 1 Moo. & Rob. 319; 6 Car. & P. 208, S. C.

(b) 3 Wils. 274.

1841.

Doe dem.
 EDWARDS
 v.
 LEACH

a variance as came within the meaning of the act. The fact of there being a consent rule to admit lease, entry, and ouster did not alter the case, for that consent rule only required the defendant to admit the existence of a lease, which was in fact only imaginary, and whether the admission applied to one day or another was immaterial. *Smith v. Knowelden* (a) was referred to.

Bompas, Serjt., in support of the rule. The case did not fall within the terms of the statute, nor within its principle. It was to be observed, that it was not the ordinary case of a variance between the declaration and the proof, but the amendment operated as an amendment of the defendant's admission. The plaintiff failed altogether in proving any demise, except by that admission, and that was a document which the judge was in no way authorized to amend. [*Erskine*, J.—That observation would have been equally applicable in *Doe d. Marriott v. Edwards*, where the amendment was in the name of the parish.] The objection was not there raised, and that decision was besides open to the observation that it was pronounced at nisi prius, and, therefore, possibly, without that mature deliberation, which such a case would receive at the hands of the full Court. In *Doe d. Poole v. Errington* (b) it was held that a count in ejectment laying a joint demise by two was not supported by proving the two to be entitled as tenants in common, and there the learned judge at nisi prius having refused, on this objection being taken, to amend the record by altering the demise, and the plaintiff having thereupon been nonsuited, the Court of King's Bench would not allow the propriety of the refusal to be discussed in banc. In the present case, therefore, as the consent rule applied only to the 15th January, the Court would not alter it to suit the necessity of the case, and a nonsuit ought to be entered as the plaintiff had failed in his proof.

(a) *Ante*, p. 402.

(b) 1 Ad. & Ell. 750; 3 Nev. & Man. 646.

1841.

Doe dem.
EDWARDS
v.
LEACH.

TINDAL, C. J.—The only question in this case is, whether the learned judge who tried the cause had the power to make this amendment, because as to the propriety of the amendment we are not called upon to give any opinion. We must assume that the amendment was in a particular, not material to the merits of the case, and by which the opposite party could not have been prejudiced in the conduct of his defence, for that point is not before us. Then the question is, whether the judge had the power to make this amendment, and I think that under the statute he had that power. The form of a declaration in ejectment is, that “John Doe complains for that one A. B., the lessor of the plaintiff, on a certain day, demised to the said John Doe a certain messuage with its appurtenances in the county in question, and that afterwards the said John Doe entered and became possessed of the said messuage, &c., and that John Doe so being possessed, the said Richard Roe afterwards, &c., with force and arms entered into the same and ejected the said John Doe.” The moment the declaration is delivered, and the party is admitted to appear in the room of the casual ejector, he enters into a consent rule, by which he binds himself to appear by himself or his attorney, to accept a declaration, and confess lease, entry, and ouster. The allegation in the declaration is, that on a certain day the lessor of the plaintiff executed a lease of the premises. The act provides that the judge may amend the record “when any variance shall appear between the proof and the recital, or setting forth on the record, &c., of any contract, custom, prescription, name, or other matter, in any particular, or particulars, in the judgment of such judge, &c., not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence.” How can it be said that the allegation in the declaration that the lessor of the plaintiff executed a lease of the premises, is not a matter alleged on the record, amendable under the words of the statute? It seems to me, then, that there was a variance

1841.
Doe dem.
EDWARDS
v.
LEACH.

between the allegation and the proof, and that the allegation was amendable under the act. Then it is said, that there was no proof at all, and that the case fails without the consent rule, but it is to be observed, that the moment the amendment is made, the declaration is to be considered to have been always in its amended form, and the consent rule adapts itself to its terms. The present rule, therefore, must be discharged.

COLTMAN, J.—I agree with my Lord that this rule must be discharged. It is to be borne in mind that ejectment is a fictitious proceeding, the creature of the Court, and created for certain purposes. In this case, the substance of the declaration is, that the plaintiff had a right of entry on the 15th January, and the proof shewed that that right only accrued on the 16th. It seems to me, therefore, that it is the case of a variance, which falls fairly and substantially, considering the objection and the nature of an action of ejectment, within the provisions of the act. The question of whether the amendment was in a matter material to the merits of the case, does not arise before us, and we must assume that the learned judge properly exercised the discretion given to him.

ERSKINE, J.—I am also of opinion that my brother *Parke* had the power to make this amendment. If this Court were confined to a consideration of the strict technical terms used on the record, this might be said not to be a variance between the proof and setting forth of some matter in the declaration, amendable under the act, because the proof would be the consent rule, by which the defendant undertakes to admit a lease like that set forth in the declaration, in the first instance. The case of a variance in the name of a parish would be a much stronger case than this, because in the consent rule, the parish is specified, and yet in such a case, in the case of *Doe d. Marriott v. Edwards*, an amendment was made. But we must not look to the strict

technical terms of the record, but to the substance of it, and the question for which that form is prepared between the parties. The substance here is, when was it that the plaintiff had a right of entry? Then, if that is the real substance of the statement of the day of the demise, the proof that the right of entry accrued on the 16th, and not on the 15th, does amount to a variance between the proof given and the setting forth of a matter in the declaration, which comes within the operation of the statute.

1841.

Doe dem.
EDWARDSv.
LEACH.

MAULE, J.—The substance and legal meaning of the declaration in this case, taken with the other proceedings, is, that on the 15th January, the lessor of the plaintiff had a right of entry on the premises in question. The proof given was, that he had a right of entry, not on the 15th, but on the 16th. Then that is a variance between the matter stated in the declaration, and the proof, and it seems to me to fall within the express words of the 23rd section of the act. It is objected that the consent rule applies only to the declaration served, and to the demise mentioned in that declaration, but that is not the true construction of the consent. The terms of the consent rule are, that the defendant will confess lease, entry, and ouster generally; and when he enters into that rule, he consents not to put the lessor of the plaintiff to the proof of any real lease, entry, and ouster, but to confess any, which may be necessary to clothe the entry with a legal form, in order to try the question. The consent rule, therefore, is applicable not only to the declaration as it originally stood, but to the declaration as it is amended, to which it applies itself as soon as the amendment is made.

Rule discharged.



1841.

LOTT and Another, Assignees of SMART, a Bankrupt
v. MELVILLE and Another.

A feigned issue under the Interpleader Act, directed the following questions to be tried between the assignees of a bankrupt, and the execution creditors, at whose suit, certain goods of the bankrupt had been seized; viz.

"If, at the time of the seizing and levying of the said goods, &c., the plaintiffs were entitled to the same as against and free from the said execution; and if the said goods, &c., were not subject to be so seized and levied under the said writ as against the plaintiffs:"

Held, that that issue raised the question, not only as to notice of the act of bankruptcy, but the plaintiffs title as assignees.

The 90th section of the

6 Geo. 4, c. 16, requiring that in any action by any assignee acting under a commission of bankrupt, notice shall be given of those matters connected with the commission, which are intended to be disputed by the defendant, does not apply to such an issue.

Where the trading sought to be proved, was, that of a money scrivener, under the 2nd section of the 6 Geo. 4, c. 16, which provides that persons using the trade or profession of a scrivener, "receiving other men's monies or estates into his trust or custody," it was held that the words of the act were not supported by proof that the bankrupt had negotiated loans, and had received procuration money for doing so, the money lent not being deposited in his hands; and, that in one instance, he had been employed to call in money which was out upon mortgage, which money he received and retained in his possession, but for which he paid interest down to the time of the bankruptcy.

THIS was a feigned issue, directed under the Interpleader Act, (1 & 2 Wm. 4, c. 58), to try the right to certain goods seized under a fi. fa., issued at the instance of the defendants out of this Court, belonging to one Smart, who had since become a bankrupt, upon an alleged act of bankruptcy committed prior to the seizure, and claimed by the plaintiffs as assignees of such bankrupt. The issue was in the following terms: "If, at the time of the said seizing and levying of the said cattle, goods, and chattels, the plaintiffs were entitled to the same, or any part thereof, as against and free from the execution; and if the said cattle, goods, and chattels were not subject and liable to be so seized and levied under the said writ as against the plaintiffs." The issue was tried before *Coleridge*, J., at the Bristol Summer Assizes, 1840, when a verdict was entered for the plaintiffs, leave being given to the defendants to move to set it aside, and to enter the verdict for the defendants.

A rule having been accordingly obtained by *Bompas*, Serjt., in Michaelmas Term,

Manning, Serjt., with whom was *Elliott*, now shewed cause. There was an objection preliminary to the discussion of those points, which formed the main object of the rule. There was no intention, under the terms of the issue, to try the question of the bankruptcy of Smart, but those terms must be taken to confine the question to the point,

whether the defendants, at the time of the seizure, had notice of the act of bankruptcy. [*Tindal*, C. J.—The terms of the issue are general, and are not confined to the question of notice, but extend to the point, whether the plaintiffs are entitled to the goods. How are you to say that they can recover, if Smart, for instance, could not be a bankrupt? *Erskine*, J.—The issue is in the common form, leaving the assignees to sue as plaintiffs, and to make out their title as assignees. *Maule*, J.—This is an action on a wager; the plaintiffs do not sue as assignees at all, but as persons who have laid a wager.] Secondly, the 90th sec. of the 6 Geo. 4, c. 16, had not been complied with. That section enacted, “That in any action by or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor’s debt or debts, or of the trading, or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters, &c.” The present case clearly fell within the principle of this provision, but no notice had been given in accordance with its terms. It might be argued, that the necessity for the notice arose only upon the plaintiffs being described as assignees; but the terms of the statute shewed that where the suit was in respect of property which they claimed as assignees, although on the record they were not so called, the case was within its principle. The statute, it was true, required the notice, “at or before pleading,” but the circumstance of there being no plea in reality put on the record did not dispense with the exigency of this provision. It was mere matter of convenience that the issue was framed without the formalities of declaring and pleading, and it was quite consistent with the convenience of the parties,

1841.

LOTT
and Another
v.
MELVILLE
and Another.

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

that an agreement having been made as to the form of the issue, the defendants should deliver their notice to the plaintiffs. But it might be taken as if in fact, the plaintiffs pleaded for the defendants, the latter having left to the former the whole care of drawing the issue. The case fell distinctly within the mischief intended to be provided against, because the same evils produced by the discussion of questions not really in dispute would arise, as well in the case of a feigned issue as of an action, conducted with all the necessary formalities. The object of the statute was, to prevent unnecessary expense being incurred by witnesses being called to prove facts, which were not intended to be disputed, and the Court, seeing that this very mischief would arise in a case like the present, unless they found themselves bound by the strictest necessity, would not take away from the parties a benefit obviously intended to be conferred on them. He cited *Earl Fitzwilliam v. Maxwell* (a), *Rex v. Phillips* (b), *Herbert v. Williamson* (c), which, he contended, were analagous in principle to the case now before the Court. Thirdly, an objection had been raised upon the trial, and upon the motion for a rule nisi, to the sufficiency of the evidence to prove the trading; and this arose upon the proper construction to be put upon the 6 Geo. 4, c. 16, s. 2. That section provided, "That all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, &c., shall be deemed as such trader, by virtue of this act, liable to become bankrupt." At the trial, it was proved that Smart was an attorney and scrivener; but the evidence by which it was sought to bring him within the terms of the statute, was to the following effect: He had been employed by a Miss Grigg to call in the sum of 140*l.* which she had on mortgage; he did so, and received the amount from the mortgagor, but retained the money in his hands, paying interest upon it to Miss Grigg,

(a) 7 Taunt. 32.
 (b) 1 Wils. 261.

(c) 1 Wils. 324.

from the date of its receipt down to the time of the bankruptcy. In other instances, he had negotiated loans, but it did not appear that in any case he had received the money into his custody with a view to his laying it out, although in one case, it was shewn that the lender and the borrower being present, he had taken the money from the hands of the former, and handed it over immediately to the latter. Upon these transactions he had charged procuration money. It was now urged, that the transaction proved in relation to Miss Grigg's money, was clearly of such a nature as to bring the case within the statute, for he had received her money into his trust or custody, and the payment of interest upon it by him, did not in any way alter the nature of the transaction, so far as his liability to be made a bankrupt was concerned. This was sufficient to support the fiat, for one act of trading done in the course of dealing, and with an intention that the same course should be repeated was enough. The other instances proved must be taken to be corroborative evidence of the same fact, and although the charge for procuration money would not necessarily bring the case within the Bankrupt Act, it went at least to shew the general character of the occupation of Smart.

Bompas, Serjt., in support of the rule. This was a case in which the necessity for notice clearly did not arise. There was no suggestion of surprise in consequence of that notice not having been given, and all the facts necessary to give the plaintiffs title must have been supposed to be put in issue. It was to be observed, that the words of the act that the notice should be given "at or before pleading," could not be complied with, for there was no plea at all, and the Court surely would not say that the notice must be given before the issue was drawn. The issue was drawn by the plaintiffs, and the defendant could not in every case learn when it would be delivered. At all events, the defendants could not comply with the strict letter of

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

1841.
└───┘
LOTT
and Another
v.
MELVILLE
and Another.

the statute, and if the equity of the act only was to be secured, the plaintiffs had suffered no damage, because they had gone down to trial prepared to try the validity of the fiat. The proof of trading was quite insufficient to support the verdict. He was then stopped by the Court.

TINDAL, C. J.—The principal question in this case, and the only one on which I have felt any doubt, is, whether the feigned issue ordered by the Court to be tried, in which the assignees of Smart, the bankrupt, are plaintiffs, necessarily falls within the 90th section of the act 6 Geo. 4, c. 16, so as to require notice to be given on the part of the defendants, of their intention to dispute the requisites of the bankruptcy. And on looking at the terms of that section, and considering the nature of the objects of the feigned issue, I think that it is not such an action as falls within its operation. That section speaks of actions by or against assignees in respect of a bankrupt's estate, from which one would suppose actions to be meant either brought by assignees for the purpose of recovering debts due to the estate, or for some injury done to some chattel belonging to the estate, or against assignees on some claim of right known to the common law, to recover something in the nature of a debt, or of damages for an injury sustained. But this is a feigned issue in the form of a wager, to instruct the Court on a particular question, and nothing can be more clear than the questions which are raised. The issue is "if at the time of the said seizing and levying of the said cattle, goods, and chattels, the plaintiffs were entitled to the same or any part thereof, as against and free from the said execution; and if the said cattle, goods, and chattels were or were not subject and liable to be so seized and levied under the said writ as against the plaintiffs." How can any one read this without seeing that the Court intended and wished to be informed whether the plaintiffs had a title to these goods, or whether the defendants, the judgment creditors,

had a right to them. That does, *primâ facie*, let in the whole of the title of the plaintiffs, and I cannot see that in requiring a specific answer, the case is involved in any of those difficulties which are intended to be met by the 90th section of the statute; because the parties are here before the Court, and they may mould the issue in any way they please; and one cannot help noticing that if the plaintiffs meant to say that there was nothing in dispute but the question of notice of the act of bankruptcy, he would have striven to confine it to that point. I, therefore, think, that this case does not fall within the words or the meaning of the 90th section of the act. There is also an objection that the notice should have been given before the time of pleading, but this cannot apply to parties in the situation of plaintiff and defendant in a feigned issue, for we all know that there is no plea in such a case. There is then only one real question in the case upon the evidence as to the point, which was principally contested on the trial, whether Smart was a person who was a trader within the meaning of the act. By the words of the statute 6 Geo. 4, c. 16, s. 2, he must be a person "using the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody." A scrivener may be a person who is a solicitor, and may procure loans of money, and receive money for his clients, but it does not follow therefore, that he fulfils the whole of the description given by the statute of such a person. There is no evidence in this case that Smart received any money into his hands or custody, except in two cases, those of Miss Griggs and another lady. In the case of the former, the only evidence is, that she having some money which was out on mortgage, directed Smart to call it in; that he did call it in, and that he retained it in his own hands, and paid interest upon it, so that he became not the depository of the money, but the borrower of it. In the case of the latter, there is no evidence that he had the money in his custody at all, but it was only proved that the money was put into his hands, if

1841.

LOTT
and Another
v.
MELVILLE
and Another.

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

indeed he received it at all, and that he immediately paid it over, and that is not sufficient to constitute him a scrivener within the meaning of the act. The case is in fact decided by the admirable and most clear judgment of Chief Justice Gibbs in the case of *Adams v. Malkin* (a). On both points, therefore, this rule must be made absolute.

(a) 3 Campb. 535. That judgment is in the following terms: GIBBS, C. J.—There is some difficulty at the present day in understanding correctly what a money scrivener is. There is no living character to refer to as an example. The business of a money scrivener, as it was formerly carried on, has been discontinued; it has been subdivided into different branches, which have been taken up by different descriptions of persons. Formerly, the business was well known. The old books are full of cases arising out of the transactions of money scriveners; to these we must look, to form an accurate judgment of the character intended by the legislature. After the statute of Elizabeth, and before the statute of James, it was considered doubtful whether a scrivener was subject to the Bankrupt Laws. The latter statute subjects to the Bankrupt Laws, all those “who use the trade or profession of a scrivener receiving other men’s monies or estates into their trust or custody.” Thus, the person to be considered a scrivener must carry on the trade or profession; it must be an occupation to which he resorts in order to gain his living. To be a scrivener within the meaning of the statute, he

must likewise, in the course of this occupation receive other men’s monies into his trust or custody. It appears from the old cases, that before bankers or brokers were so easy to be found, the scrivener was the person with whom people were accustomed to deposit their money, in order that he might lay it out for them when he should find a proper opportunity. The scrivener, in the meantime, had the use of it, and could not be questioned for the profit he made of it; till he laid it out, he was trustee, as a banker. It was not a specific sum, which, in monies numbered, he was to keep in his chest. He gave credit for it to the party who had sufficient confidence in him that he would lay it out to advantage as soon as an opportunity offered. It was seen to be of great importance that this description of persons should be subject to the Bankrupt Laws, for through them the property of others was exposed to the risks of trade: they were trusted with other men’s property as traders now are, and, therefore, it was of consequence to the public, that if any calamity happened to them, there should be the same summary means which had been before devised with respect to other persons in trade of getting at their effects,

COLTMAN, J.—The 90th section of this statute is clearly not applicable to the case of a feigned issue. That is directed to ascertain some point, and we must look to the is-

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

and making an equal distribution among all their creditors. They were, consequently, included in the stat. of Jac. 1. Since the period to which I have been referring, the business of a money scrivener has ceased. It is related, in the life of Dr. Johnson, that a person who went by the name of Jack Ellis was the last of the profession. He was a contemporary of Johnson, and is mentioned by him with great respect. At the present day, the banker occupies one department of the business of the scrivener, by being the depository of the money, and the attorney, the other, by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money scrivener, though on particular occasions, he incidentally has the money of his clients to lay out for them. In order to make a man a money scrivener, he must carry on the business of being trusted with other people's money to lay out for them as occasion offers. It is not being sent with the money of his clients, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a money scrivener. In that part of the transaction, he is no more than a person employed to fetch and carry; having negotiated the loan and drawn the deeds, his

happening to receive or pay the money is incidental to his business of an attorney. Nor if, on one or two occasions, money were deposited with him to lay out, would that constitute him a money scrivener? He must be carrying on, generally, the business of a money scrivener. That must be part of his known occupation. I cannot express what I mean to convey more correctly than in the words of the late Lord Chancellor, in a case before him:—"The next question is, as to the trading as a scrivener; that does not depend upon the fact, whether the bankrupt has or has not occasionally done acts which a scrivener peculiarly and properly would have done; not upon what he may have done upon one day, and what upon another day, but, upon his intention generally to get a living by so doing." Though an attorney may incidentally have acted as a scrivener, that is not sufficient. Though money may have been deposited with him, for which he was afterwards to seek a borrower. A few isolated instances of that sort occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws, for that would not be using the trade or profession of a scrivener receiving other men's monies or estates into his trust or custody."

1841.

LOTT
and Another
v.
MELVILLE
and Another.

sue to see what it is that the jury are to inquire into. The words of the clause do not properly apply to a feigned issue, though, for the purpose of costs, it stands in the same position as an action. With regard to the second question, it is left to the Court to say, whether the evidence afforded sufficient proof of trading, and I think that it does not, upon the ground stated by my Lord Chief Justice. The case of a person carrying on the business of a money scrivener does not necessarily come within the act, but may be distinguishable from cases falling within its provisions, by reason of their not fulfilling all the requisites pointed out.

ERSKINE, J.—My brother *Manning* has objected that the verdict in this case ought not to be disturbed, on the grounds, first, that it was not the object of the issue to try whether Smart was a bankrupt or not; secondly, that if such was the object, the defendant ought to have given notice under the 90th section of the act; and thirdly, that the evidence shewed that Smart was a trader within the bankrupt act. The generality of the terms of the issue shew, that it was the object of the Court, in directing it to be tried, to place everything in issue which would constitute the title of the plaintiff, because, if it had been represented to the Court that there was no intention to dispute the bankruptcy of Smart, the issue would have been narrowed to the question, whether the execution creditor had notice or not. But the issue seems to be framed for the purpose of including all questions which could arise as to the plaintiff's title. Then it is said, that supposing that to have been the object of the issue, it must be taken to have been left to the defendants to point out by notice, what points they intended to dispute. On looking to the 90th section of the act I agree with my Lord, and with my Brother *Coltman*, that it was not intended by the Legislature that it should apply to cases of this sort, and that if it had been so considered by the Court, it would have directed an issue in some other terms. I consider the section to mean, that where a party

sues for something as assignee, or on account of some wrong done, in respect of which he is entitled to recover damages as assignee, the defendant must give notice before plea pleaded, that he intends to dispute the commission, or that in a case where the assignee is defendant, where he can only justify as such assignee, and he does justify as assignee, the plaintiff shall before issue joined give a like notice. But here the whole object is to try the question, whether the plaintiff is assignee, or is entitled to these goods, and I think, therefore, that no notice is necessary. It seems to me, on the third point, that there is no doubt that the evidence is insufficient to prove that Smart was a trader within the meaning of the act. That is shewn by the cases of *Adams v. Malkin*, referred to by my Lord; of *Ex parte Bath* (a) where it was held, that a scrivener is a person entrusted with the money of his employers, to find a borrower, which is certainly not the case here; and by *Ex parte Warren* (b). There, it was held that a scrivener within the meaning of the bankrupt laws, is one having money put into his hands to lay out on security, and laying it out accordingly in the ordinary course of his dealing, and making profit by taking of commission; but a practising attorney acting in the common and ordinary business of his profession does not, by occasional negotiations of loans for which he receives procuration money, thereby become a scrivener within the meaning of the bankrupt laws. It seems to be necessary, therefore, in order to constitute a person a scrivener within the bankrupt law, not only that he must negotiate loans, and take procuration money for doing so, but that he must be in the habit of receiving money from others, with a view to lay it out for their profit and advantage. Here there was no instance proved in which Smart ever received money for such a purpose. All the cases, except one, were cases where there had been loans negotiated by Smart, but where the money was kept in the hands of the lender, who retained it until it

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

(a) Mont. 82.

(b) 2 Sch. & Lef. 414.

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

was called for. The only case which is dissimilar is that of Miss Grigs, but there the money was not received back from the mortgagor to be laid out again for a better security; but Smart received it, because it was wanted by the original lender, and he kept it in his own hands, and paid interest on it. If it had been retained by him for the purpose of his laying it out, that might have constituted a course of dealing; but it was not so, and Smart, in fact, was only in the position of a borrower of the money. He was not a scrivener, therefore, within the meaning of the bankrupt law, and there was no evidence to show that he was a trader.

MAULE, J.—I am of the same opinion. The first question is, whether it was open to the defendant to insist that there was no trading on the part of the bankrupt proved, and that turns on the 90th section of the act. That section uses the term “action,” and it is contended that a feigned issue is an action: and it may be for some purposes, but it is not so far as this case is concerned. The distinction is clear, for the notice being required to be given before plea pleaded, that must be taken only to apply to cases where the plea is the act of the defendant, and of the defendant alone; where the defendant has some time to plead after declaration, and where the plaintiff is no party to the plea. It is said, that in a feigned issue the defendant has a right to plead, and that the plaintiff makes up the issue for him. That is not so, but each party has as much to do with the pleadings as the other, and each party is equally concerned in drawing a proper issue to be tried. The issue is completed at once, the declaration and plea being embodied in it without any interval of time being allowed to elapse between them; so that I do not think a feigned issue is an “action,” within the meaning of this statute. And it is also to be observed, that the Interpleader Act speaks of an issue and an action as two different things. I think, then, there can be no doubt that what the Court intended to be tried here was, whether the plaintiffs could make out all the requisites

which it was necessary for them to establish, to support their right as assignees against the execution creditor. Then, supposing the question to have been properly opened at the trial, that brings us to the point, whether that which was proved amounted to proof of a trading, and I think that it did not. It is certainly somewhat obscure what the precise nature of the business of a money scrivener was, but I think that thus much appears clear, that the main part of the duty of such a person was to procure loans of money for those who wanted to borrow, and good investments for those who desired to lend. But a man might do either or both of these things, without being entrusted with other people's money under the provisions of the 2nd section of the 6 Geo. 4, c. 16, and if that was so he would not be liable to the bankrupt laws. There was some evidence given at the trial, to shew that this person was a scrivener, and that he was employed to negotiate loans, but there was nothing to prove that he received the money of other persons who wanted to have it lent, in order that he might put it out on security. In the only case in which he was proved to have received money, he took it in the character of borrower, and there was a failure of proof, therefore, that he was a broker within the act.

1841.
 LOTT
 and Another
 v.
 MELVILLE
 and Another.

Rule absolute.

POWELL v. ANCELL.

THE plaintiff declared, in an action on promises removed from a county court, and the first count was in the usual form in an action by the indorsee, against the acceptor of a bill of exchange. The declaration also contained a count for money due upon an account stated. The defendant demurred, assigning for cause, that it no where appeared from the declaration that the county court had any jurisdic-

Although in an action in an inferior Court, it is necessary to allege in the declaration, that the cause of action arose within the jurisdiction, it is not requisite, when the cause is removed to

the superior Court, by pone, that the same allegation shall be repeated.
 Debt will not lie by the indorsee against the acceptor of a bill of exchange.

1841.

POWELL

v.

ANCELL.

tion over the cause of action, or that the bill of exchange was indorsed at any place within the jurisdiction of the county court; and also that the declaration improperly contained counts in assumpsit and in debt.

Stephen, Serjt., in support of the demurrer. It was clearly established, that in all actions in inferior courts, it must be alleged that the cause of action arose within the jurisdiction. He cited 1 *Wms. Saund.* 74, *a*, note 1, to *Peacock v. Bell (a)*.

Manning, Serjt., in support of the declaration. The plaintiff need not contend that in the inferior court, the declaration would be good without the allegation that the cause of action had arisen within the jurisdiction. This, however, was a new action, and it was not requisite that the declaration should repeat those formal matters which had been duly set out in the declaration in the county court. The suit had been commenced by justices and removed by pone.

TINDAL, C. J.—Take the common case of a plaint in replevin. You must state in your declaration in the inferior court, that the cause of action arose within the jurisdiction, but when you declare again, after the cause has been removed, you need not repeat the allegations as to jurisdiction.

Stephen, Serjt., admitted that the cases were analogous, and abandoned this objection. Secondly, there was a misjoinder of counts; the first count being in assumpsit, and the second count in debt. The cause of action in the first count was such that debt could not be brought upon it, and the form of the count contained all the requisites of a count in assumpsit. In *Brill v. Neale (b)*, it was held, that a count, stating that defendant was indebted to the plaintiff for work and labour,

(a) Vide, *Read v. Pope*, 1 Cr., M. & Man. 717; 1 Ad. & El. 608.
& Ros. 302; *Salter v. Slade*, 3 Nev. (b) 3 B. & Ald. 208.

and being indebted, that he undertook and promised to pay, &c., whereby an action accrued, &c., was not a good count in debt, and could not be joined in a declaration with counts in debt. *Priddy v. Henbrey* (a), shewed that debt might be maintained by the drawer against the acceptor of a bill of exchange, expressed to be for value received; but from *Cloves v. Williams* (b), it appeared, that it would not lie by an indorsee against the acceptor, by reason of the want of privity between the respective parties. *Browne v. London* (c) also shewed that an indebitatus assumpsit would not lie by an indorsee against the acceptor of a bill of exchange, which was an analogous case (d).

1841.

POWELL
v.
ANCELL.

Manning, Serjt., the case of *Cloves v. Williams* could hardly be taken as a positive decision, because it was a case in which the defendant was allowed to amend, and which passed without much argument. The first count in the declaration in the present case, was substantially a count in debt, and debt would lie by the indorsee against the acceptor of a bill of exchange. First, as to the second proposition, it was true that to support an action of debt, there must be a privity of contract between the plaintiff and defendant; but although that was the rule of common law, many exceptions had been introduced by custom and by statute. By the common law, the assignee of a reversion could not maintain debt against the lessee, but by the 32 Hen. 8, c. 34, grantees of reversions may take advantage of conditions and covenants against the lessees of the same lands; and lessees may have the like remedy against the grantees of the reversions, which they might have had against their grantors. The effect of this statute was to transfer to the assignee a privity of contract. So here, inasmuch as the custom of merchants transferred the property in bills on

(a) 3 Dowl. & Ry. 165; 1 B. & C. 674, S. C.

(b) 5 Scott, 68: 3 Bing. N. C. 868, S. C.

(c) 1 Mod. Rep. 285: 1 Lev. 298, S. C.

(d) 1 Salk. 23.

1841.

POWELL
v.
ANCELL.

their indorsement from the indorser to the indorsee, the privity of contract was also transferred. The contention, on the part of the defendant, that debt would not lie by the indorsee against the acceptor was too wide. [*Erskine, J. Bishop v. Young* (a), points out the reason of the rule to be, that there is no privity of contract between the parties. The same point is shewn in an *anonymous* case (b), where it was held that debt cannot be sustained on a bill of exchange by the payee against the acceptor. The same result is to be derived from the recent case of *Watkins v. Wake* (c).]

TINDAL, C. J.—*Slade's* case (d) is also in point, and shews several other authorities. How are we to overturn all these express decisions? I think the plaintiff cannot succeed.

Manning then applied for and obtained leave to amend on payment of costs.

Amendment allowed.

(a) 2 Bos. & P. 78.

(b) Hardw. 485.

(c) *Ante*, p. 242.

(d) 4 Co. Rep. 91 to 95.

BARTHOLOMEW v. CARTER.

Where a defendant in an action of trespass and false imprisonment, seeks to give the special matter in evidence, under a plea of not guilty, by virtue of the

provisions of the 10 Geo. 4, c. 44, s. 41, it is necessary that he should insert the words, "by statute" in the margin of the plea, in obedience to the R. G., T. T., 1 Vict., notwithstanding the provisions of the 3 & 4 Wm. 4, c. 42, s. 1, (in pursuance of which the rule of T. T., 1 Vict. was framed,) that no rule or order made by virtue of its enactments, shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case where he may be entitled to do so, under any act of parliament, now, or hereafter to be in force.

THIS was an action of trespass, for assault and false imprisonment. The declaration was in the common form, and the defendant pleaded not guilty. At the trial, before *Coltman, J.*, which took place at the sittings after Michaelmas Term 1839, it appeared that the plaintiff was a private constable, and the defendant a superintendent in the Metropolitan police force.

The plaintiff having been dismissed from his situation, he refused to give up the uniform which he had worn until certain alleged arrears of pay were given to him, and for this refusal and detention of the clothes, he was, on the 26th of July, 1839, taken into custody. He was detained in the station house during that night, and on the following day he was taken before a magistrate, by whom he was discharged. The defendant objected that he had received no notice of action in pursuance of the statute 10 Geo. 4, c. 44, s. 41, and also sought to give evidence of justification under the plea of not guilty. On the part of the plaintiff, however, it was contended, that the defendant was not entitled to any notice of action, as in truth he had not acted in any way under colour of authority, the imprisonment of the plaintiff being authorized by no law then existing; and secondly, that as the plea of not guilty did not purport to have been pleaded "by statute," in obedience to the terms of the rule of Court of T. T. 1 Vict. (a), the defendant was not entitled to give any special matter in evidence under it. The learned judge directed a verdict for the plaintiff, but gave permission to the defendant to move for leave to enter a nonsuit, and the jury awarded the sum of 5*l.* damages.

1841.
 BARTHOLO-
 MEW
 v.
 CARTER.

Humfrey having, in the following Hilary Term, obtained a rule nisi accordingly,

Bompas, Serjt., and *Martin*, in Hilary Term 1841, shewed cause. First, the defendant had acted entirely without authority, in causing the apprehension and imprisonment of the plaintiff for that which, whatever the Legislature might have since enacted, was at the time of its occurrence no offence at all. It was true that the Legislature, by the statute 2 & 3 Vict. c. 47, had made the detention of police

(a) Jerv. Rules, p. 156.

1841.
 {
 BARTHOLO-
 MEW
 v.
 CARTER.

clothes by one of the police force after his discharge, an offence punishable with imprisonment, but that statute only received the royal assent on the 17th of August, while this imprisonment had taken place on the 26th of July. The 10 Geo. 4, c. 44, s. 41, provided "that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon," &c. The defendant was only entitled to take advantage of the plea of not guilty under the act, where notice of action had been given. It was not a case where anything had been done in pursuance of the act at all, and notice, therefore, was not necessary; but if it was, the absence of notice could be taken advantage of only by plea. *Cook v. Leonard* (a) shewed that notice of action was only required where the party sued had reasonable ground for supposing that he was acting legally; but the defendant here could have entertained no such belief. Secondly, the defendant was equally disentitled to give any special matter in evidence under the plea of not guilty, by the Rule of T. T., 1 Vict. That rule was in the following terms: "It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of Parliament, he shall insert in the margin of such plea the words 'by statute;' otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament; and such memorandum shall be

(a) 6 B. & C. 351; 4 Dowl. & Ry. 339.

inserted in the margin of the issue and of the Nisi Prius record." In order to get rid of the effect of this rule, it must be said, that it had been made by the learned judges without authority. It was to be observed, however, that the effect of the rule was not in any manner to take from the defendant any right, which he might possess, or to circumscribe any such right, but it only amended a particular matter of practice in the proceedings of the Court, over which there could not be the smallest doubt the judges had jurisdiction.

1841.
BARTHOLO-
MEW
v.
CARTER.

Humfrey, in support of the rule. First, the defendant, there could be no doubt, had acted entirely in pursuance of his duty as a police superintendent, and in no other capacity. If he acted bonâ fide in pursuance of that which he deemed to be his duty, that was sufficient to bring his case within the provisions of the statute, and to entitle him, not only to notice of action, but also to give any special matter of defence in evidence under a plea of the general issue. *Butler v. Ford* (a). With regard to the second question, it was to be observed, that the statute 3 & 4 Wm. 4, c. 42, s. 1, by virtue of which the rules of Court were made, distinctly provided, that "no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence in any case, wherein he is now, or hereafter shall be, entitled to do so by virtue of any act of Parliament now or hereafter to be in force." The present case fell directly within this proviso. The effect of the rule of Court was to take away from the defendant that right which was given to him by the 10 Geo. 4, c. 44, s. 41. If the learned judges had the power to decide that this rule of Court was applicable to the present case, they equally

(a) 1 C. & M. 662 ; 2 Tyr. 634 ; *Reed v. Cowmeadow*, 7 C. & 677, S. C. ; Vide, *Beechey v. Sides*, P. 821 ; *James v. Saunders*, 10 9 B. & C. 806 ; 4 Man. & Ry. Bing. 429 ; 4 Moo. & Sc. 316.

1841.
 ┌
 BARTHOLO-
 MEW
 v.
 CARTER.

possessed the power to take away the right to plead the general issue by statute, and to insist upon all such pleas being framed in the form of pleas of justification. He cited *Wagstaffe v. Sharpe* (a), *Shearwood v. Hay* (b).

Cur. adv. vult.

TINDAL, C. J.—This was an action of trespass and false imprisonment, to which the defendant pleaded the plea of not guilty, the words “by statute” not being inserted in the margin of the plea, in obedience to the provisions of the rule of Court of T. T., 1 Vict. The case was argued in last Hilary Term, and on behalf of the defendant it was urged, that notwithstanding this omission to conform to the rule, he was not deprived of the benefit of the provisions of the 41st section of the 10 Geo. 4, c. 44, which enacts, that notice in writing of any action, and of the cause thereof, brought in respect of anything done in pursuance of that act, shall be given one calendar month at least before action brought, and that in any action so brought, the defendant may plead the general issue, and give that act and the special matter in evidence at any trial to be had thereupon. It was urged, that our rule was made in pursuance of the statute 3 & 4 Wm. 4, c. 42, which provides, that no rule made by its authority shall have the effect of depriving any person of the right given to him by any act of Parliament, of pleading the general issue, and giving the special matter in evidence, but the result of it, as contended by the plaintiff, is entirely opposed to the right conferred by the provisions of the 10 Geo. 4, c. 44. We think, however, that the argument is untenable, and that the judges were empowered by the act of 3 & 4 Wm. 4, c. 42, to make such a rule as that of T. T., 1 Vict., which, in truth, does not deprive the defendant of the right which is conferred upon

(a) 3 M. & W. 521.

(b) 5 Ad. & El. 383 ; 6 Nev. & Man. 831.

him, but which provides only for a particular matter of practice in the proceedings of the Court. The present rule, therefore, must be discharged.

1841.
BARTHOLO-
MEW
v.
CARTER.

Rule discharged (a).

(a) Vide, *Ross v. Clifton*, 11 Ad. & El. 631, and *post*,

WYNNE v. WYNNE and Wife.

CHANNELL, Serjt., moved for a rule, calling upon the defendants to shew cause why the award made by the arbitrator in this suit, should not be set aside. It was an action of replevin brought to recover certain property distrained in respect of a rent-charge upon an estate bequeathed, in reversion, to the plaintiff, by the father of the defendant, Julius Wynne. The avowry, set out the terms of the will of the testator, which were as follows: I give and bequeath

Testator, by his will, devised an annuity, or yearly rent-charge of 20*l.* to Sarah, the wife of Julius Wynne, "so long as her conduct and behaviour should be discreet, and meet with the approbation of his (the testa-

tor's) wife, or which, in case of her death, should be approved of by the survivor or survivors of his trustees;" In an action of replevin, in respect of a distress made for arrears of the annuity, the plaintiff pleaded to the avowry that the conduct of Sarah was not discreet, and that the same was not approved of by the survivor of the trustees of the testator. Issue. At the trial, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom "the whole of the said cause, and all matters relating to the annuity in the said cause in question" were referred. At a meeting held by the arbitrator, the defendants offered in evidence, a certificate of two trustees, one of whom was since dead, that the conduct of Sarah had been approved of; the arbitrator rejected the evidence, and stated that the issue was not proved; at a subsequent meeting, evidence was given of the payment of the annuity for a series of years, and the arbitrator eventually made his award for the defendants. Upon an application, by the plaintiff, to set aside the award, on the ground that he had been misled by the declaration of the arbitrator, that the issue was not proved, the Court refused to grant the motion, there being no statement made, that the plaintiff would have called the surviving trustee to negative the allegation of approbation of the defendants' conduct, and it being consistent with the facts proved that the arbitrator might have drawn his conclusion from them, without reference to any evidence of approval of the defendants' conduct.

By his award, the arbitrator directed the payment of two sums, namely, 50*l.*, in respect of arrears, due before the commencement of the action, and 40*l.* in respect of the amount which had since accrued due: *Held*, that the award was good, the terms of the order, referring "the whole of the said cause, and all matters relating to the annuity in the said cause in question," including not only the subject matter of the action, but all matters relating to the annuity in question in the cause.

The sums awarded to the defendants, who were husband and wife, were directed to be paid to the wife, Sarah. Upon a former application to the Court, to which the plaintiff was made a party, that the husband of Sarah might appear by a separate attorney to represent his separate interests, the motion had been refused upon an indemnity being given to the husband: *Held*, that the award was not bad, by reason of the payments being ordered to be made to the wife

1841.
WYNNE
v.
WYNNE
and Wife.

a like annuity or clear yearly rent-charge of 20*l.*, to Sarah, the wife of my said son, Julius, during her life, or so long as her conduct and behaviour shall be discreet, and shall meet with the approbation of my said wife, or which, in case of her death, shall be approved of by the survivor or survivors of my said trustees." It then proceeded to state the powers of distress and entry for enforcing payment of this rent-charge, and having alleged that R. W. Wynne, one of the trustees named in the will, was still alive, but that the said wife of the testator, and all and every other of the trustees had departed this life, averred, that the conduct and behaviour of the said Sarah, the wife of the said Julius, during the life of the wife of the testator, was, in all respects, known to, and met with the approbation of the wife of the said testator, and was judged and deemed by her to be, in all respects, discreet. A similar averment was then made, with respect to the surviving trustee, and it was there avowed that the rent-charge had become in arrear and unpaid to the said Julius and Sarah, in right of the said Sarah, and continued so in arrear, &c.

The plaintiff pleaded two pleas in bar; first, that after the death of the testator, and before the accruing due of the arrears of the annuity, the conduct and behaviour of the said Sarah was not discreet, but on the contrary thereof, on the 2nd of March, 1816, and from thence continually, &c., she, the said Sarah, was living in open, avowed and notorious adultery, and in a state of polygamy, with one Robert Hutton, &c. Secondly, that after the death of the testator and his wife, and before the accruing due of the annuity, the conduct and behaviour of the said Sarah, was not discreet, nor was the same approved of by the survivor of the trustees, by the will of the testator appointed; and that before the taking of the distress, the said surviving trustee disapproved of the conduct of the said Sarah, whereby the said annuity wholly ceased.

Replication to the first plea, that after the marriage of the said Sarah with the said Julius, and more than seven years

before the said Sarah committed any adultery with the said Hutton, &c., and more than seven years before the said Sarah was married to the said Hutton, the said Julius absented himself from the said Sarah, for the space of ten years and upwards, and until the time of the marriage of the said Sarah with the said Hutton, and from thence continually until the accruing due of the said annuity, and at the time of the said intermarriage of the said Sarah with the said Hutton, the said Sarah had no knowledge of the said Julius being alive. Issue.

Upon the cause being called on for trial, a verdict was taken for the plaintiff, subject to the decision of an arbitrator, to whom the cause, and all matters in difference, relating to the annuity in the cause in question were referred. The first meeting under the reference took place in Wales, where the land was situated, and the counsel for the defendants, the issue being on them, tendered a certificate signed by Colonel Robert Wynne, the surviving trustee, and by another trustee, who was now dead, dated 9th January, 1822, in support of the allegation, that the conduct of Mrs. Wynne had met their approbation. The admission of this document in evidence was objected to, on the ground that Colonel Wynne was still alive, and might have been called, and the arbitrator thereupon declined to receive it, saying, that the issue in fact, was not proved on the part of the defendants. At a meeting, on the 5th of May, in London, the arbitrator was again pressed to receive this document in evidence, but without success. Evidence was then given of the payment of the annuity, up to the month of September, 1836, which was before Colonel Wynne became the surviving trustee, and the award was eventually made in favour of the defendants. It was now submitted that the plaintiff was entitled to have this award set aside, on the ground that he had been misled by the declaration of the arbitrator, that the issue was not proved. It was not competent to the plaintiff to obtain relief upon the ground of the rejection of the evidence tendered, but the

1841.

WYNNE

v.

WYNNE
and Wife.

1841.

WYNNE

v.

WYNNE
and Wife.

effect of the rejection of the certificate was to prevent him from giving other writings in evidence, which would have shewn that the conduct of Mrs. Wynne had not been approved of, and as he had been misled, the Court would give him that protection to which he was entitled. [*Erskine, J.*—You do not say that you would have called Colonel Wynne?] The affidavits on which the motion was made did not say so, but they distinctly alleged that the plaintiff was taken by surprise, by the determination at which the arbitrator finally arrived, and that it was in consequence of the rejection of the certificate in evidence, that he did not produce evidence of the disapproval of Mrs. Wynne's conduct. [*Tindal, C. J.*—You could not have offered a certificate in evidence to prove that? *Maule, J.*—Most likely the arbitrator thought that the result of the other evidence was, that Mrs. Wynne's conduct had not been disapproved of] Certainly, the annuity having been paid for a certain time, he might have thought that the presumption of law was in favour of her conduct having been approved of; but the ground of the motion was, that the plaintiff had been misled by the declaration which he had made, that the issue was not proved.

TINDAL, C. J.—You have not come prepared with sufficient materials, because you have not sworn that you would have called Colonel Wynne.

Channell, Serjt., submitted that upon a second ground the Court would set the award aside. The award directed the payment of 50*l.*, the arrears of annuity claimed by the avowry, and of a further sum of 40*l.* the amount of arrears from the distress down to the time of the order of reference, to Mrs. Wynne. The order of reference, directed "the whole of the said cause, and all matters relating to the annuity in the said cause in question," to be referred. These words must be taken to apply only to the annuity in question in the cause, and not to the subsequent arrears.

TINDAL, C. J.—The words “the annuity in the said cause in question” are only descriptive; and the whole matter must be taken to have been intended to be included.

1841.

WYNNE

v.
WYNNE
et Uxor.

Channell, Serjt. Thirdly, the arbitrator had directed the payments to be made, not to both the defendants, but to the defendant Sarah only. There was nothing to shew that the annuity was given to the separate use of the wife, and the award was at least bad on this ground. [*Maule*, J.—Was it absolutely necessary that the payments should be ordered to be made to the husband? Both Mr. and Mrs. Wynne are parties to the record, they are as one person.]

TINDAL, C. J.—Suppose the husband was abroad, and the plaintiff could not tender the money to him, and the wife was in England. It would not, in that case, be a bad award. But where the case was before the Court on a former occasion (a) the husband's name was only retained on the record, on an indemnity being given to him; and we cannot help seeing that this award is clearly in furtherance of the arrangement then made.

Rule refused.

(a) *Ante*, p. 396.

COLLINS v. BENTON.

BOMPAS, Serjt., in Easter Term, moved for a rule, calling upon the plaintiff to shew cause why a warrant of attorney, B. being indebted to C., in the sum of 42*l.*, handed

over to him a bill of exchange, drawn by one P. upon, and accepted by himself for that amount; B. subsequently took the benefit of the Insolvent Act, 7 Geo. 4, c. 57, and was discharged from his liability upon the bill of exchange. P., in the meantime, had been sued upon the bill, by C., and had been arrested upon judgment obtained in the action: B., upon his discharge, in consideration of the release of P. from custody, gave a warrant of attorney to C. for the amount of the bill, and also for the costs in the action brought by him against P., and certain costs incurred in the Insolvent Court, in opposing his own discharge: Upon application to set aside judgment and execution on the warrant of attorney, under the 60 and 61 sects. of the Insolvent Act: *Held*, that the instrument was invalid, as to the amount of the original debt, but that the judgment must remain in force for the amount of costs, which formed its new consideration.

1841.

COLLINS

v.
BENTON.

given to him by the defendant, and judgment and execution thereon, should not be set aside; and why a sum of 46*l.*, paid by the defendant into the hands of the sheriff of Northampton, under protest, should not be refunded. The ground upon which the motion was made, was that the debt, for which the warrant of attorney had been given, was included in the schedule of the defendant, and that he had been discharged in respect of it, under the provisions of the 7 Geo. 4, c. 57, or of the 1 & 2 Vict. c. 110; and that by ss. 60 & 61, of the former, and ss. 90 & 91 of the latter statute, the defendant was entitled to be released from the effect of the instrument. *Smith v. Alexander* (a) was cited. The affidavits, in support of the rule, stated, that the defendant having contracted a debt with the plaintiff for 42*l.*, he handed to him, in payment of that amount, a bill of exchange, drawn by one Palmer, and accepted by himself. Subsequently, before the bill became due, the defendant was arrested, and took the benefit of the Insolvent Debtors' Act. The debt arising upon the bill of exchange given to the plaintiff was included in the schedule, and his discharge was opposed by the plaintiff, in respect of that debt. On the 30th of January, 1838, he was, however, declared to be entitled to the benefit of the act. The affidavits then stated, that in the month of September, 1839, he found that Palmer was in custody at the suit of the plaintiff, in respect of the bill of exchange for 46*l.*, before mentioned, and in consideration of the discharge of Palmer, he agreed to renew his liability to the plaintiff for the amount of the bill, as well as to give security for the costs incurred by the plaintiff in opposing his discharge, and in the suit against Palmer; and on the 17th of September he executed a warrant of attorney for the whole sum, amounting to 52*l.* 11*s.* 3*d.* He subsequently paid to the plaintiff the sum of 15*l.* under the warrant of attorney, and in the month of March, 1841, judgment was entered up, and a

(a) *Ante*, vol. 5, p. 13.

ca. sa. issued for the residue. On the 17th of March he was arrested, and he paid the sum of 46*l.* to the sheriff, in respect of the judgment, &c. under protest, which he now sought to have returned. The defendant's affidavit concluded by denying that he ever had any new transaction with the plaintiff, or that he received any new consideration for the renewal of his liability, beyond that in respect of the discharge of Palmer.

1841.

COLLINS
v.
BENTON.

Channell, Serjt., on a subsequent day shewed cause. He produced an affidavit in answer from the plaintiff's attorney, who stated, that in 1837, he was instructed to sue, not only the defendant, but Palmer also, upon the bill of exchange; that the defendant, subsequently, on the 24th of November, 1837, applied to be discharged under the Insolvent Act, but was remanded; that on the 2nd of January, 1838, judgment was signed against Palmer, at the suit of the plaintiff, and that he was subsequently taken in execution, and lodged in the Fleet prison: that while Palmer was in custody at the suit of the plaintiff, the defendant called on the deponent, and endeavoured to prevail upon him to accept a composition for the discharge of Palmer, but he declined to do so, unless his costs were first secured to him; that the defendant thereupon agreed to give a warrant of attorney for Palmer's debt, and those costs, as well as the plaintiff's costs, in opposing the discharge of the defendant, and that upon the execution of that warrant of attorney, Palmer was released from custody. The affidavit further alleged that the said discharge out of custody of the said Frederick Palmer was the real consideration for the said warrant of attorney. It was now contended, that the answer to this application was, that which was suggested at the conclusion of the affidavit of the plaintiff's attorney: that the discharge of Palmer from the debt to which he was liable, was the real consideration for this instrument. The present case, in reality, arose under the 7 Geo. 4, c. 57, ss. 60 and 61, but there was no material distinction between

1841.

COLLINS

v.

BENTON.

the provisions of those clauses, and sections 90 and 91, of the 1 & 2 Vict., c. 110. The discharge of the defendant by the Insolvent Court took place under the former act, but the warrant of attorney was given after the latter statute came into operation. The warrant of attorney was given to secure three separate amounts, each of which bore a different character. The original debt was Palmer's, for he was sued as the drawer of the bill, in which capacity he was liable for its amount; and, although, if he had paid the sum for which he was sued, he must have sought a remedy against the defendant, the case was not altered by that circumstance. But at all events, the warrant of attorney could not be set aside altogether; for even if the Court should look upon this part of its consideration as being, in truth, the debt of the defendant himself, the remainder of that consideration was a new debt, made up of the two sums for costs incurred by the plaintiff in the Insolvent Court, and in proceeding against Palmer. *Smith v. Alexander* went to this extent, for there, a defendant, who had taken the benefit of the Insolvent Act, 7 Geo, 4, c. 57, induced one of his creditors to give him fresh credit, by executing a warrant of attorney for the old and the new debt, and the Court set aside the judgment only to the extent of the old debt. There, *Evans v. Williams* (a) was cited, which decided the same point. That case, however, was distinguishable from the present, because there, the surety joined the defendant in the new instrument, and although the new security might be invalid as against the defendant, it was to be observed that it was left still in operation against the surety, so that the plaintiff was not left without his remedy. In *Philpot v. Aslett* (b) it was held, that if a defendant gives a bill of exchange for a debt, from which he has been discharged under the Insolvent Debtors' Act, and an action is brought on that bill, he must plead his discharge: and if he gives a warrant of attorney to secure the payment, the Court will not set it

(a) 1 C. & M. 30.

(b) *Ante*, vol. 2, p. 669; S. C. 1 C., M. & R. 85.

aside. That case was decided on the ground that the defendant had neglected to avail himself of an opportunity which he had of pleading his discharge. *Sherman v. Thompson* (a) was to the same effect. In *Denne v. Knott* (b) where an insolvent, being arrested after his discharge, for a new debt, agreed, on A.'s becoming his bail, to give him a bond for 300*l.*, in which amount was included a debt of 80*l.*, which had been inserted in the insolvent's schedule; it was held, that the insolvent was not entitled to be discharged out of custody, having been taken in execution in an action by A. upon the bond, in which he had suffered judgment to go by default. That decision also proceeded upon the ground, that the defendant might have pleaded his discharge as to the 80*l.* The present case, however, was taken out of all those decisions by its own peculiar circumstances, and the Court would see that the consideration here for the whole warrant of attorney was the discharge of Palmer; and that the debt secured by the instrument was the debt of Palmer, and not that of the defendant. He also cited *Powell v. Eason* (c); *Abbott v. Bruere* (d); *Hocken v. Browne* (e).

1841.

COLLINS

BENTON.

Bompas, Serjt., in support of the rule.—The cases last referred to, which were cases of annuities, were not analogous to the present: but those cases which referred to bills of exchange, or warrants of attorney, were precisely in point here. The case of *Evans v. Williams* was decisive. In that case, the defendant and his surety had signed a promissory note, and the defendant was afterwards discharged under the Insolvent Act: the payee applied to the surety for payment, whereupon the defendant, to prevent the surety being sued, joined him in a new note. The Court of Exchequer held, that in an action by the payee, he could not recover

(a) 3 P. & D. 356.

(b) 7 M. & W. 143.

(c) 8 Bing. 23; S. C. 1 Moo. & S. 68.

(d) 5 Bing. N. C. 598; 7 Scott, 753.

(e) 4 Bing. N. C. 400; S. C. 6 Scott, 194; *Ante*, vol. 6, p. 634.

1841.

COLLINS
v.
BENTON.

on this note against the defendant, as it was a new contract on the old debt, though the new consideration of forbearance to the surety was added. The intention of the act was obviously this, that the defendant having been once discharged from a debt, he should not again be placed in jeopardy by taking upon himself any responsibility in respect of that debt. The series of authorities which had been referred to, shewed the care with which the Courts had always carried out that object; and the defendant, in this case, would not be deprived of the advantage to which he was entitled. Here, the debt upon the bill of exchange, whether it was called Palmer's or the defendant's, was still the same, and although the Court might not view the warrant of attorney as being necessarily invalid as to the costs secured by it, at all events it would set it aside so far as the original debt went.

Cur. ado. vult.

TINDAL, C. J., subsequently delivered the judgment of the Court. This was a rule, calling upon the plaintiff to shew cause why the warrant of attorney given to him by the defendant, together with the judgment signed, and the writ of *ca. sa.* issued thereon, should not be set aside, and why the sheriff of Northampton should not pay back to the defendant or his attorney the sum of 46*l.*, paid into his hands by the defendant, under protest, on his capture thereon, on the ground that the warrant of attorney was given as a security for the payment of a debt, in respect of which the defendant had been declared to be entitled to the benefit of the Insolvent Debtors' Act. It appears, by the affidavits, that the defendant being indebted to the plaintiff in the sum of 42*l.*, in the year 1837, accepted a bill of exchange for that amount, drawn by one Palmer, in favour of the plaintiff. In the year 1838 the defendant was discharged out of custody, and was adjudged to be entitled to the benefit of the act as to this debt of 42*l.*, which had been duly inserted in his schedule. On his discharge, he found that in 1838 the plaintiff

had obtained judgment against Palmer on the same bill of exchange, and had taken him in execution thereon : and he afterwards applied to the plaintiff for Palmer's release from prison on payment of a composition, and the plaintiff eventually consented to his discharge, on the defendant executing a warrant of attorney to secure the amount of the debt and costs for which Palmer was in custody, and also the amount of costs which the plaintiff had incurred in opposing the defendant's discharge under the Insolvent Act. The defendant, thereupon, executed a warrant of attorney for 52*l.*, and Palmer was released from custody. It further appeared, that the defendant paid the plaintiff 15*l.* on account, but subsequently judgment was signed and a ca. sa. issued for the remainder, on which the defendant was arrested, and then he paid 46*l.* into the hands of the sheriff, under protest. On this state of facts it is contended, that the judgment and execution are illegal, because they are founded on a warrant of attorney taken to secure a debt, from which the defendant has been discharged under the 7 Geo. 4, c. 57, ss. 60 & 61, by which persons are protected from all writs of execution, and from all liabilities to debts, in respect of which they have been discharged under that act, except writs issued by leave of the Court, on judgments entered up in pursuance of the statute. *Smith v. Alexander* and *Evans v. Williams* were relied on, in support of the application. For the plaintiff, it was urged that the warrant of attorney was not given to secure any debt from which the defendant had been discharged ; but that Palmer was still liable upon the bill as it was drawn, and that if the plaintiff had recovered the debt and costs from him, he might recover over against the defendant, notwithstanding his discharge, and that, therefore, the warrant of attorney was given for Palmer's debt, and not for the debt of the defendant at all. It was attempted to distinguish the case of *Evans v. Williams* from this ; there, the defendant and his surety had signed a promissory note, and the defendant having been discharged under the Insolvent Act, the payee applied to the surety

1841.

COLLINS

v.

BENTON.

1841.

COLLINS
v.
BENTON.

for payment, whereupon the defendant, to prevent his surety from being sued, joined him in a new note, and the Court of Exchequer held that in an action by the payee, the defendant was not liable, as it was a new contract on the old debt, though the consideration of forbearance to the surety was added. It was contended that that case was unlike this, because there, the surety was not discharged from his liability, whereas here Palmer was released. But we are of opinion that this distinction does not affect the principle upon which *Evans v. Williams* was decided, and we think that this is a case in which the defendant is entitled to relief, as to so much of the debt on the judgment as represents the 42*l*. recovered against Palmer. It is true that the release of Palmer presents a new consideration for the new instrument executed by the defendant, but the test applied by *Bayley, J.*, in *Evans v. Williams*, is equally applicable here; that was, whether the debt secured was the old debt or not. Let it be supposed that the warrant of attorney was given by some stranger, and before the plaintiff had taken out execution on his judgment, the assignee of the insolvent had levied enough to pay 20*s.* in the pound, and the plaintiff had received his proportion, and had thus been paid the full amount of the original debt; could he notwithstanding that proceed against the person who gave the warrant of attorney? Certainly not, because that person being only the surety, he would be discharged by the payment on the part of the principal. There would be only one debt, and the undertaking of the surety would not entitle the plaintiff to payment of the amount more than once. The identity of the debt here is obvious, and the fallacy of the plaintiff's argument consists in the contention, that the warrant of attorney was given to secure the payment of a different debt from that included in the schedule. So far, therefore, as to the sum of 42*l.*, the execution must be set aside, and the money returned to the defendant; but as the costs of opposing the insolvent's discharge, and of the action against Palmer formed no part of the original debt from which the defend-

ant was discharged, and as he has taken the payment of those amounts upon himself, we see no ground for our interference as to them. The affidavits do not sufficiently disclose how much money was due in respect of these costs at the time of the execution of the warrant of attorney, but as that is very properly a question for the decision of the Master, it had better go before him to be settled how much is due to the plaintiff in these respects; the costs of this application to abide the result of that inquiry.

1841.

COLLINS
v.
BENTON.

Rule accordingly.

COURT OF QUEEN'S BENCH.

Trinity Term.

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA.

1841.

Money deposited in Court, in one action, pursuant to the 43 Geo. 3, c. 46, s. 2, and the 7 & 8 Geo. 4, s. 71, s. 2, cannot be paid out to an execution creditor in another action, in satisfaction of his claim, notwithstanding the provisions of the 1 & 2 Vict. c. 110, s. 12, as that section does not give power to seize money in execution while in the hands of a third person as trustee for the defendant.

FRANCE v. CAMPBELL, WINTER v. CAMPBELL.

V. *LEE* shewed cause against a rule nisi obtained by *Slade*, calling on the defendant to shew cause why the sum of 220*l.* paid into Court in lieu of bail in the second action, should not be paid over to the sheriffs of London in part satisfaction of an execution in the first action. It appeared that France, the plaintiff in the first action, obtained a judgment against the defendant to the amount of 586*l.*, and sued out a writ of fieri facias against him directed to the sheriffs of London. To this, the sheriff returned nulla bona. Subsequently, the defendant was arrested on a writ of capias in the second action, and 200*l.*, together with 20*l.* for costs, were paid into Court in lieu of bail, pursuant to the 43 Geo. 3, c. 46, s. 2, and the 7 & 8 Geo. 4, c. 71, s. 2. Bail was afterwards perfected, and the defendant had not yet taken the money out of Court. The object of the present application was, that the money so paid in, should be paid to the plaintiff France, in part satisfaction of the claim, in respect of which the writ of fieri facias had been sued out. *Lee* contended that the cases of *Armistead v.*

Philpot (a); *Fieldhouse* v. *Croft* (b); and *Knight* v. *Criddle*, (c) clearly shewed that if money remained in the hands of the sheriff for the purposes of one action, it could not be applied by him in satisfaction of an execution at the instance of another plaintiff. The money in the hands of the officer of the Court was in the same situation as money in the hands of the sheriff. The present rule ought, therefore, to be discharged, unless any alteration was effected by the 1 & 2 Vict. c. 110, s. 12. The question was, whether the provisions of that section made any alteration in the law so as to sanction such an application as the present? By that section, it was provided "that a sheriff by virtue of a writ of fieri facias might seize money or bank notes in satisfaction of the writ." That however, only authorized the sheriff to take money or bank notes for the benefit of the plaintiff, at whose instance the fieri facias was issued; but did not authorize a third party to apply to the sheriff to receive money of which the sheriff was in possession. It did not empower a third party to attach money or notes, belonging to the defendant deposited in a cause at the instance of another party.

1841.
FRANCE
v.
CAMPBELL.
WINTER
v.
CAMPBELL.

Slade, in support of the rule, contended that the principle on which the cases on the other side had been decided was, that *money* could not be taken in execution; but by section 12 of the 1 & 2 Vic., c. 110, the law in that respect was changed, and consequently those cases were no longer applicable. A different decision would no doubt have been pronounced if such a power as that given by the late statute then existed. If so, as money in the hands of the master of the Court could not be distinguished from money in the hands of the sheriff, there was no objection to the present rule being made absolute.

WIGHTMAN, J.—Mr. Justice *Parke*, in the case of *Robin-*

(a) Doug. 231.

(c) 9 East, 48.

(b) 4 East, 510.

1841.
 FRANCE
 v.
 CAMPBELL.
 WINTER
 v.
 CAMPBELL.

son v. Peace (a) held that money deposited by the vendee of land in the hands of a third party for the use of the defendant could not be attached under the 1 & 2 Vict. c. 110, s. 14, and also that the 12th section only applied to money in the hands of the debtor, and not to money in the hands of a third party as trustee for him. It appears to me, therefore, that the present case is not within the 12th section, and, consequently, that the present rule must be discharged.

Rule discharged.

(a) *Ante*, vol. 7, p. 93.

REGINA v. The Sheriff of HERTS, in a cause of CHARLES
 DOD v. THOMAS COLEMAN.

Where an attachment is issued against the sheriff for not returning a writ of venditione exponas, it is no objection to an application to stay proceedings under the attachment on terms, that it is strictly regular, and the sheriff in contempt, and although the application is made after a return to the *fi. fa.* in which the value of the goods seized was not stated.

DOWLING shewed cause against a rule nisi, obtained by *Thesiger*, which called upon the prosecutor of the attachment in this case to shew cause why it should not be stayed, upon payment of the balance in the hands of the sheriff under the writ of venditioni exponas, issued in the original cause. It appeared that the plaintiff, Charles Dod, having obtained judgment against the defendant, Coleman, sued out a writ of fieri facias on the 23rd of February, indorsed to levy 226*l.* 2*s.* 8*d.*, together with interest on 224*l.* 15*s.* to be calculated from the 2nd of February. On the 24th, the sheriff seized. On the 26th, a fiat in bankruptcy issued against the defendant. On the 4th of March, the sheriff returned that he had seized certain goods and chattels, value unknown, and which remained in his hands unsold for want of buyers. He also returned that after the seizure, notice of the fiat had been given. On the 6th of March, a writ of venditioni exponas issued. On the 9th, a rule to return it in eight days was served. On the 22nd and 23rd an auction took place. On the 15th of April, the rule

to return the venditioni exponas was made a rule of Court. On the 17th of April, the attachment issued. It also appeared that from the 13th of March, to the 26th of that month the attorney for the plaintiff and the undersheriff were in communication, but from that time until the 13th of April, no communication took place between the parties. On the 26th, it was intimated by the prosecutor's attorney, that he should look to the sheriff for the proceeds of the sale. On the 13th, an offer was made to pay the balance of the proceeds of the sale, which remained in hand after satisfying previous executions, on condition of receiving an indemnity from the attorney. This was, however, refused, but the attorney agreed to accept the proceeds unconditionally. This was declined. The sheriff had, since the seizure, carried on the business of the defendant, which was that of an innkeeper, at considerable loss. On this state of facts, it was clear, that the sheriff was in contempt, and therefore liable to the attachment. In support of the application it was sworn that previous to the fieri facias in this action reaching the hands of the sheriff, three other writs of fieri facias had been lodged, amounting in the whole, to 441*l.* 3*s.* 6*d.* A claim was also made of rent to the amount of 110*l.* After the auction had taken place and the expenses had been paid, it was found that a sum of 740*l.* had been realized. The claim for rent had since been withdrawn, and, therefore, the sheriff was willing to pay over the balance after deducting the sum of 441*l.* 3*s.* 6*d.*, together with other necessary charges, from the sum of 740*l.* The balance suggested was 176*l.* 4*s.* 9*d.* *Dowling* contended, that the sheriff had no right to relief, except on such grounds as if put on the face of his return would constitute a good return. The substance of the statement in support of the application on the part of the sheriff was, that he had not sufficient in his hands to satisfy the plaintiff's writ, after satisfying previously lodged writs. After a return to a writ of fieri facias, in which he had stated no value of the goods which he had seized, that must be considered as a bad return. No value of the

1841.

DOD

v.
COLEMAN.

1841.
 {
 Dod
 v.
 COLEMAN.

goods seized being mentioned, the defect was sufficient to render that a bad return. *Wimble v. Lord Chetwynd*. (a) It must be presumed as against the sheriff that he had sufficient in his hands under the writ of fieri facias to satisfy the plaintiff's writ.

In *Rowe v. Tapp* (b) a sheriff having returned a levy under a writ of fieri facias, it was held that he could not return to the venditioni exponas, that he had sold the goods, but detained the money for another party, who was a plaintiff under a prior writ of execution. The Court there quashed the return on motion. There the sheriffs of London were ruled by the plaintiff to return the writ, and they returned that they had caused to be levied the goods and chattels of the defendant, the value whereof was unknown to them, which goods and chattels remained in their hands for want of buyers. The plaintiff then issued and served on the sheriffs a writ of venditioni exponas, and to that writ the sheriffs returned that they had sold the goods of the defendant for a certain sum which they had retained in their hands for the use of, and ready to be paid to certain named judgment creditors whose writs of fieri facias had been delivered to them previous to that of the plaintiff. The facts of that case were precisely similar to the present. The Court there quashed the return to the venditioni exponas. The Court afterwards refused to allow the sheriffs to amend their return to the writ of fieri facias, by returning nulla bona, and observed, that it was too late to make such an application after the writ of venditioni exponas had issued. The same course ought to be adopted in the present case. If the sheriff felt any difficulty in making his return to the writ of fieri facias, he might have applied for leave to make a special return, or have applied under the Interpleader Acts, 1 & 2 Wm. 4, c. 58, and 1 & 2 Vict. c. 45. The fact of his difficulties having arisen in vacation constituted no excuse for not applying, as by the second section of the latter act it was competent for him to apply at Chambers. The sheriff, therefore, had no merits to justify the Court in

(a) *Ante*, vol. 7, p. 554.

(b) 9 Price, 317.

freeing him from the result of his own misconduct, and consequently the present case must be governed by that of *Rowe v. Tapp*. If the sheriff's conduct was examined throughout the transaction, it would appear that if not guilty of collusion morally, he certainly was legally. He had by no means used proper vigilance in enabling the plaintiff to obtain the fruits of his execution, but if the dates in the transaction were examined, it would be perceived that he in fact set the plaintiff at defiance until the eve of term, when the fear of an attachment induced him to propose an arrangement. Even then the arrangement proposed was not such as could reasonably be expected to receive adoption by the plaintiff. The consequence was considerable delay and injury to the plaintiff. Such conduct in a public officer the Court certainly would not sanction.

1841.
 Don
 v.
 COLEMAN.

Thesiger, in support of the rule, cited *Hutchinson v. Johnstone*, (a) in which it was held that where there were two writs of fieri facias against the same defendant, which were delivered to a sheriff on different days, and no sale was actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution. It was perfectly clear, therefore, that the previously-lodged writs were entitled to be satisfied before that of the plaintiff. What the sheriff had done was in strict conformity with his duty. With respect to the return to the writ of fieri facias, if that was a bad one the plaintiff might have applied to quash it; not having done so, it must be treated as a good one. That, therefore, could not now be made the ground of objection. As to the delay in returning the writ of venditioni exponas, that must be considered as caused by the negotiations going on between the under-sheriff and the plaintiff's attorney for an arrangement between the parties. The plaintiff's attorney was perfectly aware of the difficulties in which the sheriff was placed, and,

(a) 1 T. R. 729.

1841.

DOD
v.
COLEMAN.

therefore, there was no pretence for charging him with collusion. The case of *Rowe v. Tapp* was clearly distinguishable from the present, as that was an application on the one hand to quash a return to a writ of *venditioni exponas*, and on the other to amend the return to the writ of *fieri facias*, no attachment having issued. Here, however, an attachment had issued, and it was admitted that the sheriff was in contempt; the present application was only an appeal to the equitable jurisdiction of the Court to say on what terms that attachment should be set aside. The sheriff did not come before the Court to claim this relief as a matter of right, but of favour. It being clear that the sheriff had not sufficient in his hands to satisfy the whole amount of the plaintiff's demand, it could not be expected that he should pay it out of his own funds. If he paid over the amount of the balance in his hands, after satisfying the previous executions and necessary expenses, and also paid the plaintiff's costs, he must be considered as entitled to relief.

Cur. ado. vult.

COLERIDGE, J.—This was an application on behalf of the sheriff to stay all proceedings upon the attachment on payment of the balance in his hands, after satisfying some prior writs. The sum indorsed on the plaintiff's writ was 224*l.* 15*s.*, with interest, the balance in hand is 176*l.* 4*s.* 9*d.* Three writs were then in the office, under which the sheriff was in possession. On the 26th, a fiat issued against the defendant, of which the sheriff had notice. The application was resisted on two grounds, the one technical, the other on the merits. On the first, it was said, that the sheriff ought not to be relieved from the attachment, unless the facts upon which he relied, would afford matter for a good return, supposing it to have been made in time, and no attachment to have issued. It appeared, that on the 4th of March, the sheriff had returned to the *fieri facias*, that he had levied goods, the value of which was unknown,

which remained in his hands for want of buyers. On the 6th, the plaintiff issued a venditioni exponas, and the sheriff now alleges the prior writs, and seizure under them, and a claim for taxes. Mr. *Dowling* contended, that it was now too late for him to do that, and cited the case of *Rowe v. Tapp* (a) which is a clear authority that these writs and claim could not have been returned to the venditioni exponas; for the plaintiff was entitled to a knowledge of them on the return to the fieri facias, and to have his option whether to contest the truth of the return, or take any other proceeding. I entirely agree in the decision of that case, but I think it does not apply to the present. The question there was, whether the return was in all respects regular; whether the sheriff could stand upon it as matter of right? Then it may be admitted by him that he has not proceeded with perfect regularity, and yet he may contend, that, under the circumstances, the attachment ought not to have issued, or even if strictly regular, yet that upon terms the further proceedings under it may be stayed. This brings me to the second ground that the sheriff had not proceeded bonâ fide. Under this term I understand to be briefly comprehended that the sheriff has either directly colluded with the defendant or some adverse claimant, or that he has conducted himself with so much ignorance of the law, or so much negligence and remissness, as are criminal in an officer such as he is. And it was attempted to charge all these upon the sheriff in the present case. The length of time, from the 24th of February to the 17th of April; the neglect to apply for relief under the Interpleader Act; the carrying on the business of the defendant for some time at a loss; the delay in selling; these and other circumstances were relied on to make out the charge. I have examined the affidavits with care, and, under all the circumstances of the case, I see no such proof of indirect or negligent conduct on the part of the sheriff as should deprive him of the relief he prays for, on certain terms. It is clear that the course he was to pur-

1841.

DOD

v.

COLEMAN.

(a) 9 Price, 317.

1841.
 {
 DOD
 v.
 COLEMAN.

sue was not free from difficulties; he thought himself entitled to an indemnity bond, and the plaintiff, by his conduct, shewed that he thought the same. They were in negotiation during the whole time, and he kept nothing back from the plaintiff, misrepresented nothing to him; and although a considerable space of time certainly elapsed, yet the whole delay is not imputable to the sheriff. Further I cannot see that by the course which the sheriff has pursued, the plaintiff has been damnified, except in the manner and to the degree which I will presently state; the prior writs have been satisfied, but to that the parties were entitled; the claim of the assignees, and of the landlord on the other hand have been satisfactorily disposed of; no one, therefore, has come in before the plaintiff improperly, or in consequence of the delay; and although the affidavit imputes that the sale was improperly, even collusively conducted, the imputation rests on no evidence, and ought, therefore, not to have been made, and was very properly not mentioned in the argument. There is, it is true, a heavy deduction from the proceeds of the sale in respect of house-keeping expenses, keep of horses and possession money; this amounts to 89*l*., but against it must be set 51*l*. for cash received from the business during the possession. Upon the whole it seems to me, that justice will be done by making the rule absolute, on the payment, by the sheriff, of all the costs incurred by the plaintiff since the rule to return the writ of fieri facias, and of this application.

Rule absolute accordingly.

ELVERD v. FOSTER.

(Before the four Judges.)

The assign-
 ment made by
 an insolvent
 debtor on filing
 his petition

under the 7 Geo. 4, c. 57, ss. 10 and 40, so fully vests his property in his assignees that a statement subsequently made by him in his schedule will not be admissible in evidence to impeach the title of the assignees to the property assigned.

MONEY had and received against an auctioneer to recover a deposit made by the plaintiff on the sale to him of

certain premises, part of an insolvent's property. A person named James had become insolvent, and had before then obtained from the owner of certain premises an agreement for a lease at a certain rent, and for a term of years corresponding with the rent. Having this agreement, and being in possession of the premises themselves, he deposited the agreement with his father, as security for a sum of 100*l*. It remained in his father's possession until the tenant became insolvent, when the latter went to prison, and finally took the benefit of the Insolvent Act. He filed his petition and assignment in the usual manner, under the provisions of the 7 Geo. 4, c. 57, and afterwards delivered in a schedule, in which he stated that his father was a creditor for the sum of 100*l*., and held this agreement, which had been deposited with him as security for that amount. This statement in the schedule, it was contended, was notice to all the world, and no valid title could be made to the premises till the equitable lien thus created on them was discharged. After the insolvency of the tenant, an application was made by the assignee to the landlord to grant a lease; but he having learned the fact of James' insolvency, at first refused to grant it to any person but James, the insolvent, with whom the original agreement had been made. The assignee then offered the landlord an indemnity for so doing, and the lease was granted in conformity with the agreement. A meeting of the creditors was afterwards held on the subject of making this lease available as assets. The father of the insolvent was present at this meeting, and he agreed with the rest that it was expedient that the lease should be sold. It was accordingly sold by auction, and one of the conditions of sale was, that the purchaser should not be at liberty to call for the production of the lessor's title, and that the vendor should not be bound to enter into any covenant respecting the same. The catalogue stated that the lease was put up for sale by order of the assignees of an insolvent's estate. The plaintiff became the purchaser for a sum of 200*l*. After the sale the plaintiff found that there

1841.

ELVERD

v.
FOSTER.

1841.

ELVERD

v.

FOSTER.

was an equitable incumbrance on the property, and he gave notice to the assignee, the vendor, to get it discharged, in order to complete the title. As this notice was not complied with, he brought this action against the auctioneer, to recover the deposit. At the trial of the cause the schedule made by the insolvent, on taking the benefit of the Insolvent Act, was put in as proof of the assignment of the agreement made by him to his father as security for the debt due to the father. This evidence was objected to on the part of the defendant, but was admitted, subject to an application to the Court. A rule for a nonsuit (finally turned into a case) had afterwards been obtained on that and other points, on all of which the case was argued; but the judgment of the Court proceeded on the single question of the admissibility of the schedule in evidence.

Kelly, for the plaintiff, insisted that the schedule was admissible in evidence, because it was a statement on oath by the man who was in fact the seller of the property, who was represented by the defendant, and whose statements were, therefore, receivable against the defendant.

Erle, contra.—The schedule was not admissible in evidence; it does not impeach the legal title of the plaintiff to convey, and that is the only matter which a Court of Law, in an action like the present, will take into consideration, *Boyman v. Gutch* (a). The assignee here had a legal title. The assignment was made prior to the schedule being filed (b). The statement in the schedule, therefore, being made after the deed of assignment had vested the property in the assignee, cannot be allowed to affect it. In *Doe d. Sweetland v. Webber* (c), it was held that the declarations or admissions, implied or express, of a person who had mortgaged an estate after he has parted with his interest therein by a settlement, are not admissible evidence on

(a) 7 Bing. 379: 5 Moo. & P. 222.

(b) 7 Geo. 4, c. 57, ss. 10 & 40.

(c) 1 Adol. & Ell. 733; 3

Nev. & Man. 586.

behalf of the mortgagee. And in *Swann v. Sutton* (a), a plea, that after action brought, plaintiff took the benefit of the Insolvent Act, and assigned to the provisional assignee, whereby plaintiff's right of action vested in such assignee, was held a good plea in bar of the further maintenance of the action. If so, it is clear that the assignment here having divested all the interest in the lease out of the insolvent, his subsequent declarations could not affect the title to the property in which his interest had been so divested.

1841.

ELVERD

v.

FOSTER.

LORD DENMAN, C. J.—It appears to me that this case must be decided without considering how far the equitable lien of the father affects the property, or what a Court of Equity might think, and how it would deal with these several parties. The insolvent's schedule was, as it seems to me, improperly admitted in evidence. The schedule was made after the assignment of the property, and after the insolvent had been thereby deprived of his interest in that property. It is clear that what he states with respect to that property, after it is so divested out of him, cannot affect the rights of third persons, nor be received in evidence against them.

PATTESON, J.—I am not prepared to say what the result of this case might have been if the question had been framed differently; but it seems impossible for us to say that the verdict for the plaintiff here can stand, without holding that the insolvent's schedule was properly admitted in evidence. Now, as the schedule seems to me to have been improperly admitted in evidence, I do not see how we can do otherwise than say that there must be a nonsuit.

WILLIAMS, J.—It is true that the schedule contains a statement made on oath, but it is a statement made by a party who has ceased to have any interest in the matter.

(a) 10 Ad. & Ell. 623; 2 Per. & Dav. 533.

1841.

ELVERD
v.
FOSTER.

WIGHTMAN, J.—It is for the plaintiff, who seeks to rescind the contract, to shew such a defect in the title as to justify him in refusing payment of the purchase money. Here, he says, that there is an equitable mortgage on the lease ; but the schedule is the only evidence of that allegation, and as that clearly amounts to a declaration made by the insolvent after the assignment of his property, it is not admissible as proof of the fact which it was intended to establish.

Judgment of nonsuit.

In the matter of ROGERS.

Where a counsel, on appearing to shew cause, is not prepared with office copies of the affidavits, on which a rule has been obtained, it is a matter of discretion in the Court, whether time shall be allowed to take office copies.

V. WILLIAMS appeared to shew cause against a rule obtained by *Chilton*, to be allowed to file an additional affidavit in answer to an enlarged rule of Easter Term, calling on an attorney to shew cause why his articulated clerk should not be assigned, it being suggested that the affidavit, by mistake, had not been filed in time. *V. Williams* admitted that he was not prepared with an office copy of the affidavit, on which the rule of *Chilton* had been moved, as by some mistake, a copy of the affidavit, filed in answer to the enlarged rule had been obtained, instead of that made in support of the present rule.

Chilton objected, on this ground, to *V. Williams* being heard. It was sought by a mere technical rule to shut out an affidavit of the attorney in answer to the original rule, and, therefore, this was not a case in which the Court would feel inclined to exercise its discretion, by giving the other side time to take an office copy now.

V. Williams contended, that as the office copy had not been procured, through mere mistake, the Court would either enlarge the rule, in order that office copies might be

taken, or permit cause to be shewn, an undertaking being given that office copies should be taken.

1841.

In the matter of
ROGERS.

WIGHTMAN, J.—It is a matter of discretion on the part of the Court whether it will give time to obtain office copies; but, under the circumstances, I think that I shall not give time for that purpose. The rule will, therefore, be made absolute, for allowing the additional affidavit to be filed.

Rule absolute.

The original rule was then referred to the Master.

In re The REGISTRAR OF BIRTHS, &c., at Brixton.

(*Before the four Judges.*)

THESIGER applied for a mandamus to the superintendent registrar of births, &c., at Brixton, to command him to erase from the register an entry, recording the birth of a male child as having taken place in February last, and therein described as the lawful son of two married persons, or to command him to insert on the margin of the register a statement that the entry of such birth had been made by him upon the fraudulent representation of certain parties named in the affidavits, on which this motion was founded. These affidavits stated circumstances tending to shew that the husband of a woman having died, she had fraudulently represented herself as having given birth to a posthumous male child, her object being thereby to secure to herself an annuity of 500*l.*, directed by the will of her husband's father, to be paid to her, in case a male child should be born, instead of an annuity of a much smaller

The 6 & 7
Wm. 4, c. 86,
which directs
that a register
of all births,
&c., shall be
kept, does not
give the Court
any power to
interfere, by
mandamus, to
correct a false
entry on the
register.

1841.
In re
The Registrar
of BIRTHS, &c.
at Brixton.

amount which was settled on her, in case she should have a female child. The registry of births is established by the 6 & 7 Wm. 4, c. 86. Its object is to preserve a true account of all births, &c., in the kingdom. This object will be so far defeated, if an entry, which is clearly false, is suffered to remain on the register. It is true, that there is no direct provision of the statute, authorizing an application like the present, but this Court has a general jurisdiction vested in it, to take care that all acts of parliament of a public and universal kind, shall be properly executed, and if there is a positive and mischievous infraction of their provisions, the authority of the Court will afford a remedy for that evil. If that jurisdiction is not exercised here, the public records of the kingdom for the registration of the births, marriages, and deaths of the Queen's subjects may be falsified with impunity. The duty of making a statement to the registrar is compulsory, and the correctness of the statement is intended to be secured by the 41st section, which subjects any party making a false statement to the penalties of perjury. But the punishment of the party will not effect a correction of the falsehood of the entry. Yet, it is clear, that it was the intention of the Legislature to do everything to preserve the accuracy of the public record, and if a false entry has been obtruded there, the general authority of this Court must be sufficient to cause it to be corrected thus effectually, to carry out the provisions of the statute.

LORD DENMAN, C. J.—We shall certainly do what is asked, if we possess the power, but, at present, we doubt whether we do possess it. The statute does not seem to have been framed to meet a case of this kind. The only provision relating to the correction of errors in the register, is contained in the 44th sect., and that section merely speaks of errors committed in the form or substance of the entry, which are to be corrected in the presence of certain

persons therein named, the parents of the child being expressly mentioned. We will consider the application, and state in a day or two our opinion.

1841.
In re
The Registrar
of BIRTHS, &c.
at Brixton.

Cur. adv. vult.

LORD DENMAN, C. J.—The facts of this case are certainly such as to make us desirous of interposing to prevent what appears to be an attempt, by some parties, to commit a gross fraud. But upon full consideration of the provisions of the statute, we think we have not the power to interfere in the way proposed. There will, consequently, be no rule.

Rule refused.

NASH v. GOODE and PARRY.

ADDISON shewed cause why two persons, named Heslop and Lever, attorneys of this Court, or one of them, should not refund the sum of 4*l.* 4*s.* 10*d.* to the defendant, in the action. It appeared, by the affidavits, that the present action had been commenced by a writ of summons, which was indorsed as having been issued by Charles Lever, as agent for Heslop, of Haverfordwest. Subsequently, the action was settled, and the sum of 4*l.* 4*s.* 10*d.*, the amount in question, was paid to Mr. Lever, as costs in the action. That payment was pursuant to an order of a judge, made by consent. The ground of the present application was, that as Mr. Heslop had not taken out his certificate for the years 1838, 1839, 1840, he was off the roll. No doubt, if the claim made by an attorney, who was off the roll, for costs, was resisted, they could not be recovered. But here, the payment of costs had been made, pursuant to an order, by consent, and, therefore, it must be considered, as a voluntary payment. It was not, therefore, competent

Where an attorney being off the roll, in consequence of not taking out his certificate, employed his agent to sue out process, and costs were paid in the action to the agent, the Court would not compel either the attorney or his agent to refund those costs.

1841.

NASH

v.

GOODE

and

PARRY.

for the defendant now to compel an attorney to refund the sum which had been so received for costs. Besides, the case of *Reeder v. Bloom* (a), shewed that the circumstance that the plaintiff's cause has been conducted by one, who is not an attorney, does not deprive the plaintiff of his right to full costs against the defendant. Again, the payment here was not made to the uncertificated attorney, but to the agent, who, it was admitted, was certificated, and he had sued out the writ. In *Goodner v. Cover* (b), it was held to be no ground for disallowing the plaintiff's attorney his costs of conducting an action, that he was not on the roll of the attorneys of the Court in which the action was brought, if it appeared that he conducted the proceedings in the name of a London attorney, who was an attorney of the Court. So in *Jervis v. Dewes* (c), where a country attorney, a defendant in a cause, not being an attorney of the Court, defended in the name of a London agent, who was an attorney of the Court, and the defendant attended the assizes in person, and the plaintiff was nonsuited, the Court held that he was entitled to his fees for attending the trial, drawing briefs, &c., as all the business must be considered to have been done in the name of the London agent. In *Jones v. Jones* (d), a country attorney admitted in the King's Bench, conducted a suit through a London agent, who was an attorney of the Exchequer. The name of the country attorney was indorsed on the writ, and in his affidavit of service, he swore that he was the attorney in the cause, and the Court of Exchequer held that he was entitled to recover his costs. And the Court also intimated that the statute of 2 Geo. 2, c. 23, s. 10, did not apply to the case of a country attorney practising in the name of a London agent.

WIGHTMAN, J.—In all those cases the party practising was an attorney.

(a) 3 Bing. 9; S. C., 10 Moore, 261.

(b) *Ante*, vol. 3, p. 424.

(c) *Ante*, vol. 4, p. 764.

(d) *Ante*, vol. 5, p. 474.

1841.

NASH

v.

GOODE
and
PARRY.

H. Hill supported the rule. The present application was not founded on the 2 Geo. 2, c. 23, to which the cases cited on the other side applied, but was made pursuant to the 37 Geo. 3, c. 90, s. 30, by which it was provided, that if any person shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any Court holding pleas, where the debt or damage shall amount to 40*s.* or more for fee or reward, or shall act in Court as an attorney, without having first obtained and entered his certificate as above directed, or shall deliver in a false or fictitious place of residence, with intent to evade the payment of the higher duties, he shall forfeit 50*l.*, and be incapable of maintaining any action for fees for prosecuting or defending suits, &c., without such certificate as aforesaid. It appeared, from the affidavits in support of the application, and was not denied on the other side, that Mr. Heslop had been admitted in the year 1834, but had never taken out his certificate for the years 1838, 1839, and 1840. He was, therefore, completely off the roll. While in that situation, the action was commenced by him, in the present case, in the name of his agent, Mr. Lever. Nothing could, therefore, be clearer, than that he was incapable, by the express provisions of the statute, of recovering his costs. The fact of the costs having been received by the hand of his agent made no difference, as the payment to the agent was a payment to the person for whom the agent acted. In *Slack, qui tam, &c. v. Wilkins (a)*, it was held, that an attorney, who had omitted to take out his certificate, during the years 1815 and 1816, and who had practised in 1832, at Quarter Sessions, was liable to the penalties under 22 Geo. 2, c. 46, s. 12, that statute depending in that case for its effect on the 37 Geo. 3, c. 90. In *Patterson v. Powell (b)*, it was held, that a notice of trial given by an attorney, who had omitted to take out his certificate was irregular. In *Wilton*

(a) 1 C. & M. 23.

(b) 9 Bing. 620; 2 Moo. & Sc. 773.

1841.

NASH
v.
GOODE
and
PARRY.

v. *Chambers* (a), where an attorney obtained his re-admission in 1823, but did not practise or take out his certificate till 1826, the Court ordered various securities that were given to him by a client, for business done as an attorney, after he had obtained his certificate in 1826, to be cancelled; for as he could not sue for work done as an attorney, not having taken out a certificate for three years after his re-admission, securities given for work, in that character, were illegal. Lord *Denman*, C. J., there said, "We think that whatever is obtained through the medium of an illegal practice, is itself illegal. The rule, therefore, must be made absolute as to all securities for himself done in his character of an attorney." Here *Lever* was described as the agent of *Heslop*, on the back of the writ. The costs must, therefore, be considered as having been paid to *Heslop*, and consequently, the costs so obtained were obtained by illegal practice. They ought, therefore, to be refunded.

Cur. adv. vult.

WIGHTMAN, J.—This was an application against *Heslop*, the plaintiff's attorney, requiring him to shew cause why he should not refund to the defendant the sum of 4*l.* 4*s.* 10*d.*, which had been paid for certain costs mentioned in the affidavit. I have considered the case, and I think the rule must be discharged, as no case has gone so far as to determine that costs which have been actually paid to an attorney who is off the roll can be recovered by action. The case of *Wilton v. Chambers*, has gone the furthest, but that only went to the extent of deciding that an attorney, under such circumstances, could not avail himself of a security given for business done while off the roll. But that did not decide that it could be recovered back by action, if it had been paid. In this case, the greater part of these costs were incurred by *Lever*, the town agent. I only mention that circumstance, because that person has suffered a disqualified

(a) 2 N. & P. 392; S. C., 7 Ad. & El. 524.

person to practise in his name. The fact is not stated in the affidavit, nor does it appear that Lever knew of this disqualification. It is not necessary to decide the case on that ground, as no case has gone so far as to shew that costs actually paid, can be recovered back. I shall, therefore, discharge this rule, but without costs.

1841.

NASH

v.

GOODE

and

PARRY.

Rule discharged without costs.

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 NEWTON v. CONSTABLE.

(*Before the Four Judges.*)

CASE.—The plaintiff declared that he was accustomed to practise as a barrister, at a Court of quarter sessions held at Ripon; that after attending at such Court of quarter sessions, where he had been actually retained, in a case to be determined there (of all which premises the defendant had notice) he was, while returning from the Court to his own house, arrested by the defendant, the high sheriff of the county, on a ca. sa. issuing out of this Court. General Demurrer and Joinder.

A barrister is not privileged from arrest on final process while attending in the ordinary way at quarter sessions, although he has been actually engaged in a case at the sessions.

Kelly, in support of the demurrer (a). If there is any privilege here, it is that of the Court, not of the individual. The Court then may punish the violator of its privileges, but the individual cannot maintain any action. A barrister, as such, does not enjoy any privilege from arrest. He may be arrested at any time, except under circumstances which clothe him with the protection of a Court. That shews that the privilege is not personal. In order that the business of the superior Courts of Westminster Hall, and of the Judges of Assize, (who are always judges of those Courts,) may not be interrupted, a barrister is privileged from arrest while

(a) The question as to the form of the action was fully argued, but not decided.

1841.
—
NEWTON
v.
CONSTABLE.

attending on them. But the privilege extends no further. Inferior Courts cannot confer it. The arrest here was valid, and the declaration not setting forth a different cause of action, there must be judgment for the defendant.

Sir W. Follett, contra. The ground of the privilege is too much restricted by the argument on the other side. The object of the privilege is the furtherance of public justice. Admitting, therefore, that the privilege is a personal one, it exists wherever the barrister is in the discharge of duties connected with the public administration of justice. This is the ground on which parties, attorneys, and witnesses are exempted from liability to arrest, while attending trials. The privilege to the barrister is the privilege of the client, and is given for the protection and safety of the public. It is admitted, on the other side, that this privilege exists with respect to the Courts of Westminster Hall and the assizes, but surely the necessity for the client's protection exists as strongly when the case is to be decided at the quarter sessions, as when it is to be decided in any Court of Westminster Hall. The value of a man's interests is not altered by the mere facts of the particular Court in which they are adjudicated upon. This argument is the more strong, since the 6 & 7 Wm. 4, c. 114, has given a party accused of crimes triable at the sessions and assizes, the right of making his defence by counsel and attorney. The law will not allow any pretext by which a party may be deprived of the advocacy of the particular counsel whom he has selected. The arrest here was in violation of a great principle of public policy and public justice, and the defendant is answerable for having made it.

Kelly, in reply. There are no authorities to shew that this privilege extends to any persons, except those who are practising before the superior Courts of Westminster Hall, or the judges on the circuits.

Cur. adv. vult.

LORD DENMAN, C. J.—This is an action on the case, for maliciously, and without reasonable and probable cause, arresting the plaintiff; the defendant, at the time, having full notice that the plaintiff was privileged from arrest. It appears that the plaintiff was, at that time, returning from the quarter sessions, where he had been practising as a barrister, having actually been engaged there in defending a man against an indictment for an assault. The defendant demurred generally to this declaration, and on that demurrer, a very protracted argument took place in the course of last Term, on the question, whether it was the proper form of action to be adopted in this case; the defendant contending, that if the action was at all maintainable, trespass ought to have been brought? We need not, however, decide that question, for we are clearly of opinion that this supposed privilege does not exist in law. The attendance of parties and witnesses, in going to a Court, remaining there, and returning from it, has long been protected by the privilege of freedom, during such attendance, from liability to arrest. It is necessary, for the purposes of justice, that it should be so; but the protection of legal officers, of whom a barrister may be considered one, is of a different character, and may well be confined within narrower limits. In the case of *Collier v. Hicks* (a), such exemptions are treated as depending on prescription. No decision, however, has settled the extent of such exemption; nor does there appear to be any authorities on this point, except certain traditions of Westminster Hall, which were mentioned and acceded to by the judges, in the case of *Meekins v. Smith* (b). The exemption, whatever it was, before the year 1833, was derived from the relative position and duties of the Bar in the Courts at Westminster Hall, and of the circuit. The latter Courts being attended by the same barristers who practised in the former. An extension of the privilege was, however,

1841.
 ———
 NEWTON
 v.
 CONSTABLE.

(a) 2 Barn. & Ad. 663.

(b) 1 H. Bl. 636.

1841.

NEWTON
v.
CONSTABLE.

made in the year 1833, in the case of *Luntly v. Nathaniel* (a), in which a barrister, who had been arrested in coming from the sessions at Newington, was discharged from custody; but, in that case, the existence of the privilege was taken as admitted without any discussion, and the question was confined to the point, whether the defendant was, at the time of the arrest, on his way home from the sessions, and the decision proceeded on the authority of *Meekins v. Smith*. But that case itself did not decide the point. The judges there stated their recollection of cases, where discharges had been ordered on this ground, but it was certainly in each of those cases, with the qualifications before adverted to. We are aware of the stat. 6 & 7 Wm. 4, c. 114, by which persons accused of crimes at the sessions, are entitled to make their defence before the justices by counsel and attorney. But that statute does not enact that the counsel and attorneys attending at sessions, should be protected from arrest while so attending, and we certainly cannot, by implication alone say, that the Legislature intended to relieve from liability to arrest, the barristers and all the attorneys who might, at one time or another, have to attend at sessions. Such a privilege would be, in effect, a privilege of exemption from liability to arrest, of all the barristers and attorneys in England. It is hardly possible to conceive that a privilege of so extensive a kind should be meant to be created without an express declaration that such was the intention of the Legislature; or, that, if it exists, it can go beyond such legal persons as have been previously retained to attend at the sessions, or can be intended to protect gentlemen who voluntarily resort to the sessions for the purpose of taking part in any business which may arise there. We are aware too, that in this case, two of the judges, before whom this case was brought on circuit, have thought the plaintiff entitled to be discharged, but on communicating with them,

(a) 2 Dowl. P. C. 51.

we find that they do not entertain any very strong opinion on the subject, and one of them has some doubt whether they acted correctly. On examination of the authorities, we think that they fail to establish the argument for the plaintiff. We are of opinion that the exemption claimed here, is too large. There must, therefore, be judgment for the defendant.

1841.
 }
 NEWTON
 v.
 CONSTABLE.

Judgment for the Defendant.

REGINA v. TUDDENHAM.

GUNNING moved to discharge the defendant, in this case, out of custody, on the ground of a defect which appeared on the face of the warrant, pursuant to which he was detained in the custody of the gaoler of Norfolk.

The warrant was in the following form :

Norfolk } The Rev. Edward Marsham, clerk, and Thomas
 to wit. } Kerslake, Esq., two of her Majesty's justices of
 the peace, acting in and for the said county, to Jeremiah
 Carmoody, one of the police officers of the said county, and
 to Money Curtis, the keeper of the prison, called the House
 of Correction, at Little Walsingham, in the said county.

Whereas Henry Tuddenham, late of the parish of East Rudham, in the said county, licensed hawker, hath been, this 31st day of May, A. D. 1841, duly convicted before us, the above-named justices, at the petty sessions, held at the parish of Fakenham, in and for the hundred of Gallow, in the said county, in which said hundred the said parish of East Rudham is situate, for that he, the said Henry Tuddenham, within the space of seven days, now last past, to wit, on the 28th day of May, in the year aforesaid, at the parish of East Rudham aforesaid, in the county aforesaid, did, in a certain room, being part and parcel of certain premises called and known by the name of the Crown Inn, set up, exercise, maintain, and keep open, in a public man-

Proceedings for the recovery of penalties relating to lotteries, contrary to the 42 Geo. 3, c. 119, must, since the 46 Geo. 3, c. 48, s. 59, be sued for in the name of the Attorney General, and not before magistrates, whether the lotteries are private or state lotteries.

1841.
REGINA
v.
TUDDENHAM.

ner, a certain game of lottery, to be determined by the chance of drawing certain tickets, on which tickets certain numbers, in figures, were then and there marked and impressed, and on the drawing of any one of which said tickets the said Henry Tuddenham, then and there undertook, in consideration of a certain sum of money, to wit, the sum of one shilling, to him paid on demand, by the drawer of the same, to deliver certain goods to such drawer of such ticket, contrary to the form of the statute, in such case made and provided; and we, the said justices, did, on the 31st day of May, adjudge, that the said Henry Tuddenham should, for his said offence, forfeit the sum of 100*l.*, according to the statute in such case made and provided: And we, the said justices, did also, on the said 31st day of May, adjudge that one-third part of the said forfeiture, should go and be applied to the use of her Majesty, one-third part thereof, to the use of William Steer, of the parish of Fakenham, aforesaid, police officer, who informed us of the said offence, and the other third part thereof, to Samuel Pegler, of the parish of East Rudham, aforesaid, police officer, being the person who apprehended the said Henry Tuddenham, pursuant to the said statute in that case made and provided: And we, the said justices, did also, on the 31st day of May, adjudge, that in default of immediate payment of the said sum of 100*l.*, he, the said Henry Tuddenham, should be imprisoned in the said prison, called the House of Correction, at Little Walsingham, for the space of three calendar months, unless the said sum of 100*l.*, being the forfeiture aforesaid, shall be sooner paid: And whereas the said Henry Tuddenham hath, on this said 31st day of May, on demand, made of him, refused to pay the said forfeiture of 100*l.*; Now, therefore, we, the said justices, do hereby command you, the said Jeremiah Carmoody, to take the said Henry Tuddenham, and him safely to convey to the said prison, called the House of Correction, at Little Walsingham, and there to deliver to the said Money Curtis, the keeper thereof, together with this precept; and we do hereby command you, the said

Money Curtis, the keeper of the said prison, called the House of Correction, at Little Walsingham, to receive the said Henry Tuddenham into the said prison, called the House of Correction, at Little Walsingham, and there to imprison him for the space of three calendar months, unless the said sum of 100*l.*, being the forfeiture aforesaid, shall be sooner paid, and for your so doing, this shall be your sufficient warrant. Given under our hands and seals, at the parish of Fakenham aforesaid, this 31st day of May, 1841.

1841.

 REGINA
 v.
 TUDDENHAM.

EDWARD MARSHAM.
 THOMAS KERSLAKE.

The warrant which appeared by the return of the gaoler to the writ of habeas corpus, pursuant to which he appeared before the Court, and under which he was detained pursuant to a conviction, appeared to be made under the 42 Geo. 3, c. 119, which had been passed to suppress certain games and lotteries, not authorized by law. By sect. 2, it was provided, that any person convicted of any of the offences therein mentioned, should be liable to pay 500*l.*, as a forfeiture, to be recovered in the Court of Exchequer, at the suit of the Attorney General, and should be also liable to be punished as a rogue and vagabond. Certain powers of proceeding in such cases, were also given to justices. One main objection, which might be taken to this conviction, was, that the justices who made it, had no jurisdiction for that purpose. By the 46 Geo. 3, c. 148, s. 59, it was provided, "That all pecuniary penalties for any offence against any law, touching or concerning lotteries, or against this act, except where it is herein otherwise directed, shall, when recovered, go, and be applied to the use of his Majesty, his heirs or successors, and from and after the commencement of this act, it shall not be lawful for any person or persons whatever, except where it is herein otherwise directed, to commence or enter into, or cause or procure to be commenced or entered, or filed, or prosecuted, any action, suit, bill, plaint, or

1841.
REGINA
v.
TUDDENHAM.

information, for the recovery of any pecuniary penalty or penalties inflicted by any of the laws touching or concerning lotteries, or by this act, unless the same be commenced, entered, filed, and prosecuted, in the name of his Majesty's Attorney General, in the Court of Exchequer, at Westminster, if such offence shall be committed in England, or in the name of his Majesty's Attorney General in the Court of Exchequer, in Dublin, if such offence shall be committed in Ireland, or in the name of his Majesty's Advocate General in the Court of Exchequer, in Scotland, if such offence shall be committed in Scotland; and if any action, suit, bill, plaint, or information, shall be commenced or entered in any other person's name or names, than is as before mentioned, the same, and all proceedings, thereupon had, are hereby declared to be null and void, and the said Court or Courts, where such proceedings shall be so commenced, shall cause the same to be staid, any law, custom, or usage, to the contrary notwithstanding." There could be no doubt that the present case came within the meaning of that act, as it appeared upon the face of the committal, that the defendant had been convicted in respect of a certain game of lottery, to be determined by the chance of drawing certain tickets, on which tickets, certain numbers in figures were then and there marked and impressed, and on the drawing of any one of which said tickets, the said Henry Tuddenham then and there undertook, in consideration of a certain sum of money, to wit, the sum of 1s. to him paid, on demand, by the drawer of the same, to deliver certain goods to such drawer of such ticket. It, therefore, appeared, that the justices making the conviction, had no jurisdiction to make it, as being for a pecuniary penalty. The proceeding, consequently, ought to have been taken by the authority of the Attorney General. No such authority was, however, here shewn.

Palmer and *O'Malley* opposed the discharge of the defendant, and contended, that the Legislature never could have intended that proceedings, such as those, which had

1841.
 REGINA
 v.
 TUDDENHAM.

been instituted by the informant, in the present case, should be carried on, either in the name of the Attorney General, or by his consent. If such consent was necessary, then it would be impossible that the persons most likely to commit offences against the 42 Geo. 3, could be punished at all. They were, generally, persons merely going about from fair to fair, without any fixed place of abode, and, therefore, no process could be served upon them. If the language of the section in question, was considered, it would appear clear, that the proceedings, in such cases, could not be intended to be carried on only at the instance, or by the consent of the Attorney General, as it was provided that in case any proceedings were taken under other circumstances, "the said Court or Courts, where such proceedings shall be so commenced, shall cause the same to be staid." Those words clearly shewed that the statute referred to proceedings commenced in the superior Courts, and not to proceedings before magistrates, for they would have no jurisdiction to stay proceedings of this kind. The case of *The King v. Liston (a)*, was an authority, to shew that the 46 Geo. 3, only applied to state lotteries, and not to such lotteries as those which were the subject of the proceedings in the present case. That was a decision on the 27 Geo. 3, c. 1, but the words of the 46 Geo. 3, c. 148, s. 59, were a mere repetition of the 27 Geo. 3, c. 1, consequently, that decision was applicable. For these reasons sufficient ground appeared for remanding the defendant to his former custody.

Cur. adv. vult.

WIGHTMAN, J.—This was a case before me, in which Henry Tuddenham, who was brought up by habeas corpus, appeared by the return, to have been committed to the gaoler of the House of Correction, at Little Walsingham, under a commitment for an offence under the statute 42 Geo. 3, c. 119, passed for suppressing certain games and lotteries, not authorized by law. There were several ob-

(a) 5 T. R. 338.

1841.
REGINA
v.
TUDDENHAM.

jections taken to the commitment, one of which is decisive, so that it becomes unnecessary for me to decide the others. The objection in question was, that since the statute 46 Geo. 3, c. 148, such a proceeding as the present before magistrates cannot be sustained, when by the 59th section of that act, it is directed that proceedings for all penalties concerning lotteries, shall be in the name of the Attorney General; and if proceedings are commenced in any other person's name, they are "declared to be null and void, and the said Court or Courts, where such proceedings shall be so commenced, shall cause the same to be staid: any law, custom, or usage to the contrary notwithstanding." Now, that clause relates to "all pecuniary penalties for any offence against any law touching or concerning lotteries, or against that act." According to those words, there can be no doubt that this case would be included, for on the face of this commitment, the offence is described as "a certain game of lottery, and to be determined by the chance of drawing certain tickets, on which tickets certain numbers in figures, were then and there marked and impressed, and on the drawing of any one of which said tickets, the said Henry Tuddenham then and there undertook, in consideration of a certain sum of money, to wit, the sum of 1s. to him paid on demand, by the drawer of the same, to deliver certain goods to such drawer of such ticket." In answer to this objection, which was taken on the prisoner being brought up, but which was not mentioned when the habeas corpus was moved for, the case of *The King v. Liston* (a) was referred to; but, if it had not been for that case, I should have thought the objection decisive. Now, that decision is, I confess, an extraordinary one to my mind. It was on a conviction removed by a certiorari, into this Court, and which had been made on the statute, 12 Geo. 2, c. 28, passed for preventing excessive and deceitful gaming. One objection there made was, that the statute, 12 Geo. 2, c. 28, referred to the statute, 10 & 11 Wm. 3, c. 117, which was

(a) 5 T. R. 338.

an act for suppressing lotteries, and declared certain games within that act to be lotteries. Then, the statute, 27 Geo. 3, c. 1, was mentioned, by which the jurisdiction of magistrates was taken away in express terms, to convict for penalties incurred for offences concerning lotteries. The judgment of the Court is thus expressed. "There is no pretence for either of the objections: the first, (the one which I have referred to) has been already overruled in a case which came before us two years ago. The lotteries meant by the 27 Geo. 3, c. 1, are state lotteries only." The case there referred to, appears not to be reported any where. Now, on reference to the statute, 27 Geo. 3, c. 1, in section 1, certain acts are recited, the first of which appears, amongst other things, to be for suppressing illegal lotteries; and section 2, takes away the jurisdiction of magistrates, and directs the mode to be followed for recovering penalties "which shall be incurred by any person or persons offending against such parts of the *said* acts, or any of them, as touch and concern lotteries." The case of *The King v. Liston*, seems to decide that those words refer to *state lotteries* only, and yet one statute is recited, which refers to illegal lotteries generally. The statute, 8 Geo. 1, c. 2, is one recited, which is, amongst other things, "for suppressing lotteries, denominated sales and other private lotteries. That statute, therefore, expressly applies to illegal lotteries generally, and to penalties inflicted as to them. It is true, the words of the 2nd section of the 27 Geo. 3, c. 1, are "as touch and concern lotteries," and no doubt the language of the Court, in the case of *The King v. Liston* is very express that that clause applies to state lotteries only, but the Court there decided on a previous decision which is not reported, and so we cannot now say what may have been the precise ground on which that previous case was decided. However, in the present case, the language of the statute, 46 Geo. 3, c. 148, s. 59, is very different from that of the 27 Geo. 3, c. 1, s. 2. The language is, that it shall not be lawful for any person to commence proceedings "for the recovery of any pecuniary

1841.
 REGINA
 v.
 TUDDENHAM.

1841.
 REGINA
 v.
 TUDDENHAM.

penalty or penalties inflicted by any of the laws touching or concerning lotteries, or by this act," unless commenced in the name of the Attorney General, in the Court of Exchequer. Now, both the statutes, 42 Geo. 3, c. 119, and 46 Geo. 3, c. 148, have been passed since the decision of the case of *The King v. Liston*. Therefore, whether the Court would now arrive at the same conclusion on those statutes is another question. By the 7th section also of the 42 Geo. 3, c. 119, all the provisions, powers, &c., of the 27 Geo. 3, c. 1, are extended to this very statute, 42 Geo. 3, c. 119, therefore, even if it were not on account of the 46 Geo. 3, c. 148, the present commitment would be bad, as the provisions of the 27 Geo. 3, c. 1, expressly takes away the jurisdiction of magistrates. The magistrates, therefore, I think, could not make this commitment. Proceedings for penalties under the 42 Geo. 3, c. 119, having, certainly by the statute, 46 Geo. 3, c. 148, s. 59, been restricted to be taken in the name of the Attorney General, in the Court of Exchequer. That section, I think, applies to the offence in question, and that since the passing of it, such a proceeding as the present cannot be taken by a common informer. Practically also, I believe, it is usual, that the proceedings should be taken in the name of the Attorney General, in the Court of Exchequer. The prisoner must, therefore, be discharged. It is unnecessary, that I should decide the other objections.

Prisoner discharged.

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 Doe dem. LEWIS v. ELLIS.

Where a rule of Court in an action of ejectment, required possession of certain pre-

mises to be delivered up, but did not mention by whom, the Court refused to make a rule absolute for an attachment against the tenant in possession for not delivering them up; and, as he was a stranger to the ejectment, also refused to grant a rule requiring him to deliver up possession.

PETERSDOFF shewed cause against a rule nisi, for an attachment against a person named Lovell, for not delivering up possession of certain premises to the defendant, pursuant

to a judge's order, which had been made a rule of Court. The order directed the possession of the premises generally to be delivered up, without naming any particular person as the one who was to deliver up such possession. The order was entitled in a cause of "*Doe dem Lewis v. Ellis*," to which Lovell was no party. In the rule also the name of Lovell was not mentioned; that person not having been specifically required to deliver up possession, the non delivery of the possession could not amount to a contempt. An attachment consequently could not issue. The present rule must, therefore, be discharged.

1841.
 Doe dem.
 LEWIS
 v.
 ELLIS.

Butt, in support of the rule, contended that as the order required possession to be delivered up, that must be by the person in possession of the premises. Lovell was in possession of the premises; he had been required to deliver them up, but had refused. In doing so, therefore, he had been guilty of a contempt, and the present rule ought to be made absolute.

WIGHTMAN, J.—The order is made in a cause to which Lovell is no party. In my opinion, in order to warrant an attachment against him for not obeying a rule, the party must be named in the rule. You may institute fresh proceedings, and introduce the name of Lovell into the rule, if he is a proper party to be so introduced. At present there is no sufficient ground to warrant me in granting the rule. The present rule must, therefore, be discharged, without costs.

Rule discharged, without costs.

Butt moved on behalf of the defendant for a rule to shew cause, requiring Lovell to give up possession of the premises in question, he being the person who was in possession of those premises. He had been required to give them up, but had refused so to do. He made no claim to any title in respect of the premises, and there was nothing to shew any

1841.

Doe dem.
 LEWIS
 v.
 ELLIS.

connection between him and either of the parties in the ejectment.

WIGHTMAN, J.—Lovell has nothing to do with the suit: Supposing he claims title in his own right, he cannot be compelled, in this manner, to deliver up possession of these premises. The order may be effective, as regards Lewis and Ellis, but Lovell is a third person who is totally unconnected with the suit. He is, therefore, a mere stranger. I do not think enough has been done to authorize this application. I do not think I can grant the rule.

Rule refused.

REGINA v. PAGET.

On an application for an attachment for non-payment of money, pursuant to an award, the affidavit of the money being still due may be made by the attorney where it has been demanded by letter of attorney.

M. CHAMBERS shewed cause against a rule nisi, obtained by *Peacock*, for an attachment against the defendant for non-payment of money and costs, pursuant to an award. The demand had been made pursuant to a letter of attorney. The affidavit, in which it was sworn that the money was still unpaid, was made by the attorney of the prosecutor, and not by the prosecutor himself. This, it was submitted, was insufficient.

Peacock, in support of the rule, contended that the usual practice was for the attorney, and not the party, to make such an affidavit.

WIGHTMAN, J. (after consulting Master Bunce.)—It is not necessary that such an affidavit should be made by the party, if one is made by the attorney.

Rule absolute.

1841.

CARRUTHERS v. GRAHAM and Others.

M. CHAMBERS and *Butt* shewed cause against a rule nisi, obtained by *Hoggins*, under the 1 Wm. 4, c. 22, s. 4, for examining a witness named F. F. Carruthers before the Master vivâ voce. In support of the rule, it appeared that the witness had stated that he was going abroad to New York on his way to Canada. It was not sworn positively that he was going there. In answer to the application, it was sworn that the witness was the son of the plaintiff, who made the present application; and it was also suggested that he was afraid to submit to cross-examination on the trial of the cause, and, therefore, the present application had been made. Under these circumstances, it was submitted that the present rule ought not to be made absolute.

It is no ground of objection to a rule for examining a witness vivâ voce, before the Master, pursuant to 1 Wm. 4, c. 22, s. 4, that it is suggested that he is unwilling to submit to cross-examination, or that he is the son of the party applying, if he appears to be independent of his father's influence.

Hoggins, in support of the rule, contended that the grounds stated on the other side were no objection to the present application. In *Weekes v. Pall* (a), it was held that the fact of a plaintiff not proceeding promptly in a cause was not an answer to a rule for examining a material witness on interrogatories, he being about to go abroad. The suggested fear on the part of the witness of submitting to cross-examination furnished no reason why he should not be examined vivâ voce before the Master; and with respect to his being the son of the plaintiff, it was sworn that he was quite independent of his father. The rule, consequently, ought to be made absolute.

WIGHTMAN, J.—I don't think that the suggestion of the witness being unwilling to submit to cross-examination is a sufficient ground of objection to the present rule being made absolute: nor do I think that the fact of his being the son

(a) *Ante*, vol. 6, p. 462.

1841.
 CARRUTHERS
 v.
 GRAHAM
 and Others.

of the plaintiff is a sufficient ground, as it appears he is a perfectly independent agent. There is nothing to show that the father exercises such a control over him as will take the case out of the ordinary rule. Therefore, as it is positively sworn that he has stated himself to be going abroad, and as it is clear that his intention is to go before the trial comes on, I think that the rule must be made absolute for a *vivâ voce* examination before the Master. If he is in England when the trial comes on, of course his examination cannot be read.

Rule absolute.

DOE d. CLARKE and Others v. THOMSON.

In a subpoena to a witness to give evidence in an action of ejectment, the names of the lessors of the plaintiff should be introduced.

If the original writ of subpoena requires the witness to appear on the 27th of May, and the copy served, requires him to appear on the 24th, an attachment for disobedience cannot be obtained.

PLATT and *V. Lee* shewed cause against a rule nisi, for an attachment against a witness for not attending a trial pursuant to a writ of subpoena. It was objected, first, that in the original subpoena the cause was described as "John Doe, plaintiff, and Amos Thomson, defendant," without introducing the names of the lessors of the plaintiff; and secondly, that the copy of the subpoena served required the witness to attend on the 24th of May, and the subpoena itself required him to attend on the 27th of May. These two defects, it was contended, were fatal to the present application.

Sir *F. Pollock* and *Miller* supported the rule.

WIGHTMAN, J.—The subpoena was not properly entitled; but the other objection was of itself enough to discharge the rule.

Rule discharged.

1841.

BELL v. TIDD.

COWLING shewed cause against a rule obtained by *Martin* for setting aside a judgment signed by the plaintiff, on a warrant of attorney given by the defendant, who had become bankrupt. It appeared, by the affidavit, in support of the application, that the plaintiff was a shareholder in the Albion Joint Stock Bank at Liverpool. The defendant, being in want of money, applied to the plaintiff for a loan of 300*l*. The plaintiff agreed to lend that sum; and the defendant, by way of security, gave his acceptance for that amount, at three months' date, and also a warrant of attorney for the same amount and interest thereon. The plaintiff delivered to the defendant his cheque for 300*l*. drawn on the bank. The defendant, however, did not get this cheque cashed; but the plaintiff, after indorsing the defendant's acceptance, took it on the 21st of July to the bank, and got it discounted. The proceeds of this, he paid over to the defendant. The warrant of attorney was not given, until the 25th September; and the defeasance indorsed stated that the warrant was given to secure the repayment of the 300*l*. lent and advanced by the plaintiff to the defendant, on the previous 30th of June, together with interest thereon. The defendant drew up this warrant and defeasance, the plaintiff not objecting to its form. It was afterwards duly filed by the latter. On the 3rd of October, the defendant's bill became due. On the 2nd October, the day immediately previous, the plaintiff, at the instance of the defendant, lent the latter the sum of 100*l*. to assist him in taking up the bill, as the plaintiff now swore, pursuant to a previous arrangement. The next day, the defendant paid the bill, supplying the difference between the 100*l*. and the 300*l*. from his own resources. The sum of 200*l*. was afterwards lent by the plaintiff to the defendant on the 15th of October. On the 20th of January following, judgment was signed by the plaintiff on the warrant of attorney. The

Where a trader having contracted a debt, gave a warrant of attorney to secure its payment specifically, and the creditor sought to enforce that security against the goods of the debtor, in respect of subsequent advances made by the creditor, the Court, at the instance of the assignees, set aside the proceedings of the creditor.

The Court would not, on the affidavit of the plaintiff, that he understood that the warrant of attorney was intended to cover subsequent advances, extend the defeasance to those advances.

1841.

BELL

v.

TIDD.

defendant now having become embarrassed in his circumstances, an application was made by him to the plaintiff and certain other creditors, to induce them to accept a composition of 8s. in the pound upon the amount of their debts. A composition deed to that effect was accordingly signed. It was provided by that deed that the amount of the composition should be paid by instalments. The first was to become due on the 23rd of April, the second in the month of July following, and the third in October following. No clause was introduced into the deed to render it void, if all the creditors of the defendant should not accept the composition. An affidavit of debt, pursuant to the 1 & 2 Vict. c. 110, s. 8, for the purpose of rendering the defendant bankrupt, was duly filed in the Court of Bankruptcy. A copy was regularly served, together with the usual notice, on the defendant. Not having complied with the provisions of the statute, the defendant committed an act of bankruptcy on the 2nd of March: the plaintiff issued execution pursuant to his judgment on the warrant of attorney, and on the 20th of February levied the amount of 280*l.* on the goods of the defendant. That amount remained in the sheriff's hands. A fiat in bankruptcy was issued on the 3rd of March against the defendant; on the 5th, he was regularly declared a bankrupt; and assignees were chosen on the 19th. The present rule was obtained on the 23rd of April, at the instance of the assignees, calling on the plaintiff to shew cause why the judgment and execution thereon in the present case, which had been signed and issued pursuant to the warrant of attorney, should not be set aside, and the proceeds of the levy paid over to the assignees, in case no part of the debt secured by the warrant of attorney was unpaid at the time of signing judgment, or if any part remained unpaid, why the balance of the proceeds, less the part unpaid, as also the costs of judgment, should not be paid to the assignees. The rule was served on the plaintiff and the sheriff. No affidavit was made by the defendant in support of the rule.

1841.

BELL
v.
TIDD.

Cowling, who appeared on the part of the plaintiff produced an affidavit made by his client, in which he swore that it was arranged and understood between him and the defendant, that the latter should be assisted by the former, in case of necessity, to take up the bill, and that the warrant of attorney was to be given as a security for sums of money which should be from time to time advanced by the plaintiff to the defendant. As a preliminary objection, it was contended that the present application being made on behalf of the assignees, they could not be heard, as they were strangers to the transaction, and, therefore, had no right to interfere. The cases of *Chipp v. Harris* (a), and *Taylor v. Nicholls* (b), were authorities for that proposition. The assignees could have no right greater than that which the bankrupt possessed, and it was quite clear that if the bankrupt brought an action for the money so levied as money had and received to his use, the plaintiff would have a right to set off his claim for subsequent advances of money to the bankrupt. But even supposing the assignees had a locus standi, the facts of the case here shewed that there was no ground for the present application. It was quite clear that throughout, even after the transaction of the bill, there was a subsisting claim of 300% by the plaintiff upon the defendant in respect of the 100% advanced expressly to assist in taking up the bill, and the 200% afterwards lent in the month of October. Although the exact terms of the defeasance might seem to confine the warrant of attorney as a security for the 300% in respect of which the bill had been given, yet it was clear, from the affidavits, that it had been treated between the parties as a security for advances made, down to the time of the bankruptcy. All those transactions were protected by the 2 & 3 Vict. c. 29, no act of bankruptcy at that time having been committed, of which the plaintiff had notice. Here it was admitted the act of bankruptcy was not committed until after the execution. If any action, therefore, was brought

(a) 5 M. & W. 430.

(b) 6 M. & W. 91.

1841.

BELL

v.
TIDD.

against the plaintiff to recover the proceeds of the execution, he might successfully defend the action against the assignees. As to the composition deed, that could have no effect upon the question, as the fiat rendered the composition deed of no effect.

Cresswell and *Martin* supported the rule. As to the preliminary objection which had been taken to the right of the assignees to interfere, by applying for this rule, the cases of *Chipp v. Harris*, and *Taylor v. Nicholls* had no effect whatever. The assignees had clearly a right to apply for this rule. It was quite clear that the assignees were interested in the proceedings of the execution, which had been levied pursuant to the judgment on the warrant of attorney. In the case of *Harrod v. Benton (a)*, Lord *Tenterden* said, "I am quite clear that the Court have jurisdiction over a warrant of attorney, and a judgment founded upon it, upon the application of any party in any manner interested in impeaching them, and applying to set them aside on the ground of fraud, although he is not a party to the warrant of attorney itself." This was a clear authority to shew that the assignees were authorized to interfere. Again, in the case of *Martin v. Martin (b)*, a warrant of attorney, which had been fraudulently given, and which had the effect of depriving a landlord of his power of distress, was, at his instance, set aside by the Court. The assignees could not, therefore, be considered as strangers to the transaction. The question then was, whether upon the merits the warrant of attorney could be considered as a security for sums of money advanced subsequent to the transaction in respect of the bill of exchange? It was quite clear, from the language of the defeasance, that it was intended only to be a security for the loan of the 30th of June: no parol agreement could alter or extend the meaning of the instrument. The

(a) 2 Man. & Ry. 130; S. C. 8 B. & C. 217.

(b) 3 B. & Ad. 934.

1841.

BELL

v.

TIDD.

advance of 300*l.* was made by means of the cheque. The transaction of the bill on the following day put an end to any claim in respect of that advance; if not at the time of the discount, it was, when the bill was paid at maturity. The advance of the 100*l.* which the plaintiff made on the 2nd October, and of 200*l.* which he made on the 15th, were, in fact, independent transactions. The warrant of attorney could not, therefore, be treated as a security for those advances, although they might become fresh liabilities on the part of the defendant. No right, therefore, existed in the plaintiff to render the warrant of attorney available in respect of those new debts; if he did so, he would be extending the meaning of the defeasance far beyond what either its language or intention warranted. As to the composition deed, it was clear that the plaintiff was bound by it. The case of *Lewis v. Jones* (a) was an authority to show that the composition deed must be construed according to its contents; and, therefore, that parol evidence was inadmissible to show that the plaintiff had been induced to sign a composition deed by misrepresentation of its legal effect. No clause, therefore, having been introduced to make the instrument void, as to the acceptance of the composition, if all the other creditors did not sign it, the instrument was still binding on the plaintiff: whatever might have been the understanding of the plaintiff at the time, was, consequently, immaterial. The present rule ought, therefore, to be made absolute.

Crompton appeared on behalf of the sheriff, and submitted that his client was entitled to the costs of appearing on the rule.

Cur. adv. vult.

COLERIDGE, J. — This was a rule moved at the instance of the assignees of the defendant, a bankrupt, for the purpose of setting aside the judgment signed on a warrant of attorney

(a) 6 D. & R. 567; S. C. 4 B. & C. 506.

1841.

BELL

v.

TIDD.

given by the bankrupt. The ground for the motion was, that the debt secured by the warrant had been satisfied before the signing of the judgment; this was denied by the plaintiff, and he farther insisted that, at all events, the assignees could not, under the circumstances, make the application. This latter point, appears to me, to present no difficulty. *Taylor v. Nicholls* (a), and *Chipp v. Harris* (b), which were cited in support of the objection, have, really, no bearing on it; in the first, Mr. Baron *Parke* only said that the bankrupt himself might make the motion; in the latter, the person moving was treated merely as a third party, having no interest: and the case was decided on another objection. It cannot be doubted that the assignees of a bankrupt, whose goods have been seized under an execution alleged to be fraudulent, have a sufficient interest on behalf of the creditors generally, to apply for the Court's interference to set it aside. In *Harrod v. Benton* (c), the Court held that a single judgment creditor might apply; and that involves the present point, so far as it turns upon the question of interest. It was said, that the assignees could not interfere in this case, because the bankrupt himself could not have sued for the proceeds of the execution without being met by a plea of set off. It must not be taken as universally true, that the remedies of the bankrupt, and of his assignees, are exactly co-extensive; many familiar cases will occur to every one, where, the transaction being in effect a fraud on the general body of creditors, the assignees are not bound, although the bankrupt might be: but this is not a case in which the test suggested at all applies. Here, there is no waiver of the alleged wrong; no affirmance of the act done; nothing which lets in the consideration of mutual credit, or set off; but the assignees allege, that the plaintiff has wrongfully availed himself of a satisfied security to give himself a preference over a general body of creditors, in respect of a debt which ought to have been proved and

(a) 6 M. & W. 91.

(b) 5 M. & W. 430.

(c) 8 B. & C. 217; S. C. 2

Man. & R. 130.

paid rateably only under the fiat. I cannot doubt, that if the facts clearly make out that allegation, the Court ought to give them the relief they pray for. This, therefore, brings me to the substantial question, as to which the dates and a few facts are material. The plaintiff was the holder of shares in a Joint Stock Bank, and, on the 30th June, had a balance there of nearly 300*l*. On that day, he agreed to lend the defendant 300*l*., for which he was to have the security of the defendant's acceptance at three months, and a warrant of attorney. On that day, accordingly, the bill was drawn, and plaintiff gave defendant a cheque on the bank for 300*l*. This, however, was not presented; and instead of the money being procured in that way, the plaintiff, on the 1st July, indorsed and discounted the bill at the bank, and handed over the proceeds, minus the discount, to the defendant. The warrant of attorney was to be prepared at the defendant's expense, and the plaintiff entrusted him with its preparation. The plaintiff swears that it was understood that it was to be a security for money advanced from time to time, the defendant makes no affidavit, but, in point of fact, the warrant of attorney, which was not given till the 25th September, 1840, is expressly limited to secure the sum of 300*l*., lent on the 30th June, with interest. The defeasance is very short and simple; the plaintiff had a full opportunity of objecting, if it was made in any other form than had been agreed on, which he never did, but on securing it, took the necessary step by filing, to make it a valid security. On the 2nd of October, the day before the maturity of the outstanding bill, the plaintiff advanced to the defendant 100*l*., which, with 200*l*. of his own money, the defendant paid into the bank on that day, for the purpose of retiring the bill. On the 15th October, the plaintiff lent the defendant 200*l*. more. On the 20th January, the plaintiff signed judgment on the warrant of attorney, and levied execution on the 20th February; but, in the interval, he had executed a composition deed, under which he agreed absolutely to accept payment of 8*s*. in the pound, in satisfaction of all moneys due to

1841.

BELL

v.
TIDD.

1841.

BELL

v.
TIDD.

him from the defendant, the payment to be made by instalments, none of which would fall due before the date of the execution, or of the fiat, and which deed contained no proviso, that it should be void in case the other creditors did not come in. The fiat issued on the 3rd March. It is contended, on the part of the assignees, first, that the 300*l.* lent on the 30th June, was satisfied by the discount of the defendant's acceptance on the 1st July. No loan was, in fact, made until the bill had been discounted; and although that bill was accepted by the defendant, yet the substance of the transaction undoubtedly was, that the plaintiff should procure the money by discounting at his own bankers, and where his own credit must have been mainly looked to, the bill on which both he and the defendant would be liable, and having procured it, should lend it to the defendant. The assignees next contend, that the loan, at all events, was paid by retiring the bill at maturity by the defendant; and so far as that was done without advance by the plaintiff, I think they contend rightly. If the defendant, with his own money, or with money procured elsewhere than from the plaintiff, had taken up the bill, the whole transaction of the 30th June would have been closed, and if the warrant of attorney was limited to secure the plaintiff as to that transaction, the defendant might immediately have insisted on the instrument being given up to be cancelled. On the other hand, if the plaintiff had taken up the bill, or what would have been the same, supplied the defendant with the money for the purpose, it never could have been said that the advance of the 300*l.* on the 1st July had been repaid. Unless, therefore, the conclusion to be drawn from what appears on the face of the defeasance can be varied by the understanding sworn to by the plaintiff, this rule ought to be made absolute to the extent of paying over to the assignees the whole of the proceeds of the levy, beyond the sum of 100*l.* advanced by the plaintiff on the 2nd October, for a person having the security of a judgment for a satisfied debt, cannot, as against third persons, avail himself of it for

the purpose of protecting another unsecured demand. To the extent of 100*l.* the execution would, however, be proper, because the plaintiff having contributed that towards the retiring the bill, the 300*l.* was to that extent unpaid. And I think it would be full of danger to allow the operation of the warrant of attorney to be extended beyond the plain and specific terms of the defeasance. The deed of composition appears to me to stand upon a different footing; the precise language of the instrument has not been brought before me; but I may presume that no clause in it provides for vacating the warrant of attorney; and as that remained in force, and the assignees must insist that the deed itself has become entirely inoperative for all the purposes contemplated by it by the force of the fiat, they cannot be assisted in attempting to set it up merely for the purpose of preventing the plaintiff from acting on the warrant of attorney. The sheriff was served with this rule; and looking at its language, I think he was justified in appearing. He ought, therefore, to have his costs of showing cause out of the fund, as well as his poundage and expenses on the levy to the extent of 100*l.* The rule will be absolute in part, as I have stated above; but, under the circumstances, without costs, as between the plaintiff and the assignees.

1841.

BELL

v.

TIDD.

Rule accordingly.

ROFFEY v. SHOBRIDGE.

W. H. WATSON shewed cause against a rule nisi, obtained by *Jervis*, for setting aside a writ of trial, and all subsequent proceedings on the ground of irregularity. The order for the writ of trial had been obtained on the 30th of March, and the trial took place on the 27th of May, when a verdict was found in favour of the plaintiff, and on the stated. The damages stated in the declaration, were 50*l.* The writ of summons was indorsed for 17*l.*, and the particulars claimed 15*l.* for rent, and 2*l.* damages for non-repair and improper use of premises. A verdict was found for the plaintiff. The Court set aside the proceedings on the ground that it was not a case within the meaning of the 3 & 4 Wm. 4, c. 42, s. 17; but without costs, as the defendant might have objected to the order being made, or moved to set it aside when made.

The first count of the declaration was, for not using premises in a tenant-like manner; the second, for use and occupation; the third, on an account

1841.
 ROFFEY
 v.
 SHOEBRIDGE.

28th, the present rule was obtained. It was an action of assumpsit; the first count was for not using certain premises in a tenant like manner; the second was for use and occupation, and the third was on an account stated. The writ of summons was indorsed with the sum of 17*l*. The particulars of demand stated, that the action was brought for not repairing, and not properly using certain premises, and the amount thence accruing was calculated at 2*l*. The remaining sum of 15*l*. was claimed in respect of two quarters' rent. In the declaration, the damages stated were 50*l*. The objection to the proceeding was, that such a cause of action did not come within the meaning of the 3 & 4 Wm. 4, c. 42, s. 17, and therefore could not be tried on a writ of trial. The case of *Allen v. Pink* (a) was in point. There, the declaration stated that, in consideration that the plaintiff would buy of the defendant a certain horse for 7*s*. 2*s*. 6*d*., the defendant promised the plaintiff, that it was a quiet worker, and would go well in spare harness. It then averred the purchase of the horse, and that it was not a quiet worker, and would not go well in spare harness, whereby the plaintiff was put to charges in keeping, and taking care of it. There were also counts for money had and received, and money due on an account stated. The Court of Exchequer there held, that this record might be sent for trial before the sheriff, under the 3 & 4 Wm. 4, c. 42, s. 17. The Court there recognized the case of *Price v. Morgan*. (b) In that case, the first count of the declaration stated, that in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to A.; the defendant undertook that he was authorized by A. to purchase it on his behalf; that the plaintiff sent the pony to the defendant, and was willing to sell it to A., but that the defendant had no authority from A. to purchase it. The second count was a similar one, but only stated that the defendant himself undertook to purchase the pony. An indebitatus count for a pony sold and delivered, was

(a) *Ante*, vol. 6, p. 668. S. C.; (b) 2 M. & W. 53.
 4 M. & W. 140.

also contained in the declaration. There, the Court of Exchequer also held that the action might be tried on a writ of trial. Those two cases were perfectly analogous to the present, and therefore, the present rule ought to be discharged.

1841.
 ROFFEY
 v.
 SHOEBRIDGE.

Jervis, in support of the rule, contended that the present case did not come within the meaning of the 3 & 4 Wm. 4, c. 42, s. 17. In the case *Jacquet v. Bower*, (a) the first count of the declaration was for wrongfully discharging the plaintiff and his wife from the service of the defendant. The second count was for wages. The sum indorsed on the writ of summons was 5*l.* 19*s.*, and the particulars stated the action to be brought for 5*l.* 19*s.* arrears of wages, and for such damages as the jury might give by reason of the plaintiff and his wife having been discharged by the defendant without notice. The plaintiffs recovered a verdict for 15*l.* 19*s.* The Court of Exchequer held, that the sheriff had no jurisdiction to try this cause under the 3 & 4 Wm. 4, c. 42, s. 17, as that statute only applied to cases where the claim could be indorsed according to the true meaning of 2 Reg. Gen., H. T. 2 Wm. 4. There, the Court took time to consider, and Mr. Baron *Parke* delivered the judgment of the Court, and observed, "On considering the words of that clause, the Court are of opinion that it was not, and that no writ of trial can be sent to the sheriff, unless the whole debt or demand of the plaintiff is of such a nature as may be indorsed on the writ of summons, according to the true meaning of the 2 R. H. T., 2 Wm. 4. It is true, that, on one point there was a limit in this case, *viz.*, so far as regards the amount of the sum sought to be recovered in the shape of wages for by-gone service, which served to explain the nature of the plaintiff's demand so far, but it by no means followed, that the sum would be the full amount of damages which the jury would give. That depended entirely on the peculiar circumstances of the case; in other words, the damages were unliquidated damages, and, consequently, not within the statute. It

(a) *Ante*, vol. 7, p. 331, S. C.; 5 M. & W. 155.

1841.
 ROFFEY
 v.
 SHOORBRIDGE.

might as well be said, that an action against a carrier for the loss of goods entrusted to his care, could be tried before the sheriff as the present case. The circumstances here, that there was a probable limit to the amount does not prevent the possibility of the damages given exceeding the amount, and, therefore, we think that this writ was improperly sent to the sheriff, and that this rule must be made absolute." That case was exactly in point to shew, that unless the claim made by the plaintiff was merely a debt, it could not be made the subject of an inquiry on a writ of trial. It appeared from *Price v. Morgan*, that the fact of the defendant not objecting to the order being made, was immaterial; for, in that case, the application to set aside the writ, was made by the party at whose instance the order for the writ was obtained. Again, in *Lawrence v. Wilcock*, (a) the full Court of Queen's Bench held, that such an objection as the present was not taken too late, although an assent to try before the sheriff had been given by both parties. The case of *Edge v. Shaw* (b) was to the same effect.

WIGHTMAN, J.—I think the defendant is entitled to make this rule absolute, for setting aside these proceedings, but not with costs. He might have objected to the order being made, or when it was made, he might have applied to set it aside. The order was made on the 30th of March, and the trial did not take place till the 27th of May. Abundance of time therefore, was afforded to make such an application. The present rule must be made absolute without costs.

Rule absolute without costs.

(a) *Ante*, vol. 8, p. 681.

(b) *Ante*, vol. 4, p. 189.

WARNE v. HADDON.

The omission to sue out an original writ of *capias ad satisfaciendum*, previous to issuing a writ of *testatum capias ad satisfaciendum*, is a mere irregularity, which is unavailable to the defendant, after a lapse of six years.

FORTESCUE shewed cause against a rule obtained by *Archbold*, calling on the plaintiff to shew cause why the

testatum capias ad satisfaciendum should not be set aside, on the ground that the original capias ad satisfaciendum had been issued into the county, wherein the venue in the action was laid. This objection only amounted to a mere irregularity, as according to the case of *Davidson v. Dunne* (a), the defect might be cured, by the production of a regular writ of capias ad satisfaciendum, even after a rule had been obtained to set aside the testatum capias ad satisfaciendum. In that case, the Court refused to discharge a defendant out of custody, on a testatum capias ad satisfaciendum, on the ground that the indorsement, pursuant to the rule of H. T., 2 & 3 Geo. 4, of the defendant's place of abode, had not been made (b). The execution had issued in the year 1835, and, after that lapse of time, the defendant was too late to take advantage of a mere irregularity.

1841.
 WABNE
 v.
 HADDON.

Archbold, in support of the rule, contended, that the present objection rendered the writ of testatum capias ad satisfaciendum, not merely irregular, but null. The venue in the action, and the judgment were in London, while the writ of execution was issued into Surry. The judgment, did not, therefore, warrant the execution. There being no judgment to support the execution, it was a mere nullity. The lapse of time was, therefore, immaterial. That might have the effect of curing an irregularity, but could not cure a nullity.

WIGHTMAN, J.—The writ is clearly not void; the plaintiff might have amended, but he has not. The irregularity still remains consequently. But as the defendant does not come to take the objection, until after the lapse of six years, I think he is too late. The present rule, must, therefore, be discharged, but without costs.

Rule discharged, without costs.

(a) *Ante*, vol. 4, p. 119.

ante, vol. 7, p. 322, and *Brown v.*

(b) See *Bettyes v. Thompson*, *Hudson*, *ante*, vol. 8, p. 4.

1841.

Affidavits used in answer to an application to set aside an award made pursuant to a submission to arbitration by deed, must be stamped, notwithstanding the 5 Geo. 4, c. 41, which repeals the 54 Geo. 3, c. 184, as to stamps on legal proceedings in general (a).

A cause, and all matters in difference, were referred to the award of two named persons, and such third person as they should appoint, or of a majority of them. A difference having arisen between the originally named arbitrators, a statement was made by each to the third as to what he thought the award should be. An award having been made by an umpire and one of the arbitrators, without any further meeting, the Court set aside the award.

In the matter of Arbitration between TEMPLEMAN and REED.

S. MARTIN appeared to show cause against a rule for setting aside an award, and was about to read affidavits in opposition, when

Jervis and *Ball* objected that the affidavits were not stamped. According to the schedule of the 55 Geo. 3, c. 184, such affidavits clearly required a stamp; and the 5 Geo. 4, c. 41, the object of which was to repeal the previous statute as to stamps on legal proceedings in general had not affected the present case. In the third schedule to the latter act, the provision was, that no stamp should be necessary on "affidavits to be filed, read, or used in any action or suit in any of the Courts of law at Westminster." In the present case no action had been commenced, but the parties had submitted their differences to arbitration by deed. The affidavits, therefore, sought to be used on the other side, were not affidavits in any action or suit, and, therefore, could not be read without a stamp.

S. Martin, in support of the rule, contended that the objection being so purely technical, the Court would allow time to swear fresh affidavits, and enlarge the rule for that purpose.

COLERIDGE, J.—I think that the rule must be enlarged; and if anything can be made of the objection that the affidavits have been sworn after the time for shewing cause, that objection will be open to discussion. The party shewing cause must pay all costs consequent on the enlargement of the rule.

Rule enlarged accordingly (b).

Martin afterwards shewed cause on the merits. The

(a) The 4 & 5 Vict. c. 34, s. 1, amends 5 Geo. 4, c. 41, and provides, that no stamp shall be necessary on any "affidavits whatsoever, whether to be read, filed, or used in the said Courts, or

before judges, commissioners, or officers, in any action or suit, or otherwise howsoever."

(b) See *Ex parte Watkins*, post, p. 974.

1841.

TEMPLEMAN
and
REED.

ground on which the rule had been obtained was, that the arbitrators had not duly consulted with each other previous to making their award. It appeared by the affidavits that a cause and all matters in difference between the parties had been referred to the award of certain persons named, "James Keyton and Henry Buxton, and of such third person as they should nominate before they proceeded to act, or of a majority of them in case they could not unanimously agree." On the part of Templeman, the arbitrator Keyton had been nominated, and on the part of Reed, Buxton was nominated. Pursuant to the submission, the arbitrators so appointed, chose a person named Holt as the umpire. Accordingly, several meetings were held, which were attended by all the arbitrators. In none of them, however, did Holt, the umpire, take any active part, but merely attended and took notes. At length, the arbitrators appointed by the parties absolutely disagreed with respect to the allowance of certain items, so that it became impossible that they should reconcile their judgments. It was then arranged between them, that each of the arbitrators should furnish a statement as to what he thought should be the substance of the award, and that then the umpire should determine what the award should be. The statements were furnished according to this arrangement, and Holt, in conjunction with Keyton, without any further meeting of the three arbitrators, on the 2nd January made an award in favour of Templeman. The objection was, that an award so made, not being the result of consultation by all three arbitrators, it was not an award in conformity with the submission. The case of *Allen v. Perring* (a) was an authority in answer to the rule. The affidavits were extremely contradictory on both sides. The effect of them are stated in the judgment.

Jervis and *Ball* supported the rule, and cited *Potter v. Newman* (b).

Cur. adv. vult.

(a) 5 N. & M. 374; S. C. 3 Ad. & Ell. 245.

(b) *Ante*, vol. 4, p. 504; S. C. 2 M., C. & R. 742.

1841.
TEMPLEMAN
and
REED.

COLERIDGE, J.—This was a motion to set aside an award made by two out of three arbitrators; and the substantial question is, whether they have made it without due consultation with, or intimation given to the other arbitrator. The reference was “to the award of James Keyton and Henry Buxton, and of such person as they shall nominate before they proceed to act, or of a majority of them in case they cannot unanimously agree.” The principle on which this case must be decided is quite clear. The parties are desirous of having their dispute settled by a unanimous award of three, and no award of two can be good until the third has had a full opportunity of joining in it, and has declared his dissent from it, or withdrawal from the reference. It is necessary to see whether in substance this principle has been acted on in the present case. As might be expected, the affidavits are not quite agreed; but it appears that the two arbitrators, nominated by the parties respectively, having differed about the allowance of some items, it was proposed, and finally agreed, that each should furnish the third who had attended the previous meetings and taken notes, with a statement, containing his view of the case, and what should be the proper award. Buxton, the nominee of Reed, swears to an understanding, that when Holt had examined these papers, he should give notice of another meeting. This is denied by Keyton and Holt, who treat the latter rather as an umpire, whose office it had become to decide between the former and Buxton. This was certainly an erroneous view of the agreement to refer, but not in itself conclusive of the case. The three never met again, according to Buxton’s statement, which has not, in my opinion, received a satisfactory contradiction in this respect. He heard no more of the proceeding; took no farther part in it; nor had any opportunity of doing so, until two days after, on the 31st December, when he received a note, which he annexes to his affidavit, from Mr. Holt, returning him his papers, and stating, “that he and Mr. Keyton had agreed on the amount to be paid by Reed and Templeman; and that as it would be needful to add the expenses to that amount, he

wished to have Buxton's charges; that he and Keyton would each charge five guineas, and that if that amount would satisfy Buxton, the blank might be filled up." The language of this note seems to import that Holt and Keyton had met in the absence of Buxton, gone through the accounts, and, at least, it shews clearly that they had definitively settled the terms of the award, even if they had not gone the length of preparing the draft of it. Supposing all this to have been done, I have no difficulty in saying that the award could not stand. However strong the differences might have been between Buxton and Keyton, up to the conclusion of the last meeting, nothing had occurred which warranted Keyton and Holt in considering the two statements apart, and, finally, making up their minds without further reference to Buxton. If the representations made on the other side be true, that Holt considered both statements by himself, and having made up his mind to agree with Keyton, communicated that result to each; still if it rested there, I should equally think the award could not be sustained; for, as yet, the three had never consulted together. Holt's view of the case and his reasons had never been presented to the mind of Buxton; and they had parted without any direct renunciation by him of any further interference. On the contrary, it is clear that he intended to act, if Holt had agreed with his views, which at least he supposed possible. Holt, therefore, would have been bound to bring the arbitrators again together if he could, and present his view and reasons for it to their consideration; for it by no means followed, from the difference of the two, that Buxton might not be convinced by his arguments. This brings me to the last important question in the case, whether Buxton had an opportunity afforded him of another meeting to consider of the award. This is asserted on the one side and denied on the other. If, indeed, Buxton's account of the transaction be true, and the note, as it would be understood by any ordinary reader, truly represents what had passed, I think the offer of another meeting of little importance; for,

1841.

TEMPLEMAN
and
REED.

1841.
TEMPLEMAN
and
REED.

according to that, the award, although not fairly copied or formally executed, was definitively agreed on, and in substance made; and so the offer of another meeting would be an idle form. If Holt's account, however, be true, he had only done what each arbitrator had desired him to do; and a meeting to confer on his views would have cured every defect in that mode; and if Buxton refused to attend any such meeting, there would then have been that difference between Buxton and Keyton which would have authorized the latter to make an award with Holt. I have stated that as to this part, the affidavits of Holt and Keyton seem to me not quite irreconcilable with that of Buxton, and with the fair import of the note; and if they differ, I think it more safe to act upon the written document. I am, therefore, upon the whole, brought to the conclusion that the objection is made out, and that the miscarriage arose from the arbitrators mistaking the duty they had to perform. Holt seems to have thought that his active interference was not to commence till Keyton and Buxton differed finally, and Keyton and Buxton that they were to represent their respective nominors, and act as advocates instead of judges. Courts of law will always construe awards, and hear motions respecting them with a desire to sustain the judgment of the tribunal which the parties have selected, and which in so many instances act most beneficially for them; but I must say that I the less regret the conclusion I am now brought to, because references of this kind, which are frequently resorted to, are, in my opinion, senseless and mischievous, founded on a totally wrong principle, expensive in their operation, and constantly ending in failure and disappointment.

Rule absolute.

FRY v. MONCKTON.

(*Before the four Judges*)

IN this case the defendant had put several special pleas on the record, issue was joined upon them, and, at the trial, a verdict on these issues was found for the plaintiff. But the learned Judge, before whom the trial took place, was afterwards applied to on behalf of the defendant, and certified under the 4 Anne, c. 16, s. 5, that there was probable cause for the defendant pleading these pleas. The Master, acting on that certificate, refused to allow the plaintiff the costs of those issues on taxation.

Where issues on special pleas have been found for the plaintiff, the judge, at the trial, may still, under the 4 Anne, c. 16, s. 5, certify, that the defendant had probable ground for pleading such pleas, and, under this certificate, the Master may, notwithstanding the rule. H. T., 4 Wm. 4, s. 7, allow the defendant the costs of those issues.

Erle now moved for a rule to shew cause why the Master should not review his taxation of costs. The title of a party to costs upon particular issues, now depends on the rules of Hilary Term, 4 Wm. 4 (a), and on them alone. It is true, that the case of *Robinson v. Messenger* (b) seems an authority the other way; but it is submitted that due weight was not given there to the authority of the New Rules. The Rules must be taken to be part of the statute, 3 & 4 Wm. 4, c. 42, s. 1, by the authority of which they were made. As those Rules clearly state when a party is entitled to costs, all the previous practice on that subject must be considered as repealed by those Rules. Now the statute of William declares that a plaintiff is entitled to the costs of issues on pleas found in his favour; and it gives no power

Quære, whether such a certificate can be granted except at the time of the trial.

(a) First General Rules and Regulations, No. 7, *ante*, vol 2, p. 318, "Upon the trial where there is more than one count, plea, &c., upon the record, and the party pleading fails to establish a distinct subject matter of com-

plaint, or ground of answer, in respect of each count or plea, he shall be liable to the other party for all the costs occasioned by such count or plea."

(b) 8 Adol. & Ell. 606; S. C. 3 N. & P. 585.

1841.
 FRY
 v.
 MONCKTON.

to the Judge to certify to deprive the plaintiff of the costs of such issues. The certificate was, therefore, granted without authority, and cannot deprive the plaintiff of the costs of those issues to which he is entitled by the terms of the New Rules. Besides, the certificate is bad on another ground. Even if the Judge had power to grant it, under the statute of Anne he had no power to grant it, except at the time of the trial. Here it was granted behind the back of the party. [*Patteson, J.*—I am not sure that that was right. The Court entertained doubts on that point in *Robinson v. Messenger.*]

PER CURIAM.—We cannot now unravel the decision in *Robinson v. Messenger.*

Rule refused.

CODRINGTON v. CURLEWIS.

An appearance entered by the plaintiff's attorney for the defendant is irregular, if it omits the words "according to the statute," as prescribed in the form contained in the schedule to the 2 Wm. 4, c. 39. (*The Uniformity of Process Act.*)

BAYLEY shewed cause against a rule nisi, obtained by *Petersdorff*, calling on the plaintiff to shew cause why the appearance entered by him, and all subsequent proceedings, should not be set aside, on the ground of its not following the form given in the schedule to the 2 Wm. 4, c. 39. The form given in the schedule to the statute was, "G. H., attorney for the plaintiff, appears for the defendant C. D., according to the statute." The form adopted by the plaintiff in the present case was, "John Burt, attorney for the plaintiff, appears for the defendant — Curlewis," omitting the words "according to the statute." *Bayley* submitted that this was an immaterial omission, and, therefore, did not vitiate the appearance. In *Forbes v. Mason (a)*, it was held that the omission of immaterial particles in the

(a) *Ante*, vol. 3, p. 104.

writ of *capias* would not constitute such an irregularity as the Court would notice, provided the omissions did not alter the meaning of the writ. Here it could not be said that the omission of the words in question would alter the meaning of the appearance entered by the plaintiff.

1841.
 CODRINGTON
 v.
 CURLEWIS.

Petersdorff, in support of the rule, contended that a variety of cases had shewn the necessity of strictly pursuing the forms given by the Uniformity of Process Act. The form given in the schedule as to what the appearance ought to be was materially different where the appearance was entered by the defendant himself, or by the plaintiff for him. If the appearance was entered by the plaintiff's attorney for the defendant, without stating that it was done according to the statute, an inconsistency and illegality would appear on the record; for then the same person would appear to be acting as attorney both for the plaintiff and the defendant, which was illegal; *Hutson v. Hutson* (b), *Todd v. Gompertz* (c).

WIGHTMAN, J.—The appearance is clearly irregular, and, therefore, the rule must be made absolute, but without costs. The ground of my judgment is, that the appearance entered by the plaintiff is not in conformity with the directions of the Uniformity of Process Act. It is necessary that the forms prescribed by the act should be complied with. The present rule must, therefore, be made absolute, but without costs.

Rule absolute, without costs.

(a) 7 T. R. 7.

(b) *Ante*, vol. 6, p. 296.

1841.

In the matter of HAWDONE.

A conviction of a conspiracy to extort money by means of libels, is a sufficient ground for not permitting an attorney to be re-admitted.

V. LEE applied for the re-admission of an attorney named Hawdone, the usual notices having been given.

Robinson appeared, on the part of the Law Institution, to oppose the re-admission of the applicant. The grounds of the opposition were, that he had been twice convicted of conspiracy with other defendants to extort money from different persons by means of libels in the *Paul Pry* newspaper. For the first offence he had been sentenced to twelve months' imprisonment, and for the second, to nine months' imprisonment. Both sentences he had undergone. The libels in question, which had formed the foundation of the conspiracy, were of the most disgusting and revolting description. On these grounds, it was submitted, that the applicant was not a fit person to be placed on the roll of attorneys of the Court.

V. Lee supported the application, and contended that the mere fact of the applicant having been convicted of such an offence as conspiracy, did not render him unfit to be placed on the rolls of the Court. In the case of *Re* — (a), where an application was made to strike an attorney off the roll, on the ground of his having been convicted of a conspiracy, Mr. Justice *Parke* refused the application, and made use of these observations: "There are no cases in which there is more variety than in cases of conspiracy; they vary from the highest degree of enormity to the lowest degree of culpability. There is no case which goes the length of deciding that the mere fact of having been convicted of a conspiracy is a sufficient ground for striking an attorney off the roll." All that the Court would consider in this case was the fact of the convictions; and ac-

(a) *Ante*, vol. 1, p. 174.

according to the case cited, the mere fact of conviction was not enough to warrant the Court in striking an attorney off the roll; if not, it could not be a sufficient ground for preventing his getting on the roll. It was admitted that he had been punished for the offence. But, if this opposition was allowed to prevail, his punishment would be never-ending, as the conviction would operate as a perpetual disability, that could hardly be considered as consistent with justice. In the case of the *The King v. Greenwood* (a), where an attorney had been absolutely struck off the roll for malpractice; on application afterwards, he was allowed to be re-admitted; and the Court then observed, "that the striking off the roll was not to be understood as a perpetual disability, but was sometimes meant only as a punishment, and might be considered in the light of a suspension only, if the Court sees cause." For these reasons, and on the authority of the cases cited, it was submitted that the applicant was entitled to be re-admitted.

1841.
In the matter of
HAWDONE.

WIGHTMAN, J.—I am of opinion that a person who has been convicted of a conspiracy to extort money by means of libels, is not a fit person to be placed on the roll of attorneys of this Court.

Re-admission refused.

(a) 1 W. Black. 222.

— *Do v. Pitcher v. Roe* 2 L.R. 100

DOE d. PITCHER v. ROE.

FORTESCUE shewed cause against a rule nisi, obtained by *Petersdorff*, calling on the tenant in possession of certain premises in the county of Surrey, to shew cause, why he should not deliver up the said premises, or why an attachment should not issue against him for having improperly possessed

lessor of the plaintiff, afterwards, on the same day, forcibly resumed possession of the premises, the Court ordered a writ of restitution to issue within a week, the defendant paying the costs of the application for the writ.

Where a defendant in ejectment, having been put out of possession by the sheriff, and possession given to the

1841.

Doe dem.

PITCHER

v.

ROE.

himself of them. The facts, material for the present inquiry, were, that the tenant had, as it was suggested, irregularly possessed himself of the premises in question after the lessor of the plaintiff had been let into possession. A rule of Court was then obtained for a writ of restitution, and the writ issued accordingly. The sheriff's officers accordingly proceeded to the premises in the afternoon, and having dispossessed the tenant, gave possession of them to the lessor of the plaintiff. In the night of the same day, the tenant came to the premises and took forcible possession of them. On this state of facts, the present rule was obtained. It was submitted that the tenant, being in possession, the proper course for the lessor of the plaintiff to pursue was to bring an action of ejectment, so that the respective rights of the parties might be tried according to the course of the law, and not by this summary application to conclude the question. The tenant claimed under the will of the same ancestor as the present applicant; and, being in possession, the Court would not look to the means by which that possession was acquired, but would leave the party who now sought to disturb the possession to the usual remedy which the law prescribed, namely, an action of ejectment. In the case of *Kingsdale v. Mann*(a), the sheriff delivered possession by virtue of a *habere facias possessionem*, in the morning. Some hours after the sheriff was gone, the party in possession, the defendant, came and turned him out again. The Court then said, "If the plaintiff had been turned out immediately after he was put into possession, or while the sheriff and his officers were there, an attachment might have been granted; for this had been a disturbance to the execution, and a contempt; but being several hours after, *curia dubitavit*." Secondly, it was agreed "that the Court might grant a new *habere facias possessionem*, if the *fieri* was not returned." In that case, therefore, only a few hours having elapsed between the

(a) 1 Salk. 321.

possession being taken and the interference of the defendant, the Court refused an attachment. Here a much longer space of time had elapsed between the time of giving and resuming possession, and, therefore, the Court would not interfere as proposed.

1841.

Doe dem.
PITCHER
v.
ROE.

Petersdorff, contra, was stopped by the Court.

WIGHTMAN, J.—I shall not make the rule absolute for an attachment; but I shall make it absolute for a fresh writ of restitution, to be executed within a week. The rule for the writ of restitution on the former occasion was rendered perfectly abortive by the conduct of the defendant. He must pay the costs of this application, also within a week.

Rule absolute accordingly.

Exparte FAITH and Another.

M. CHAMBERS moved for a rule to shew cause why an attorney of this Court should not pay over a sum of 150*l.* to the applicant, under these circumstances. The attorney against whom the application was made was steward of a manor in which the fines to the lord were uncertain. The applicants were the surrenderees of copyhold lands in the manor, on which they were about to build houses; and it was agreed between them and the steward, on the part of the lord, that a certain fine of 10*s.* per house should be taken in lieu of the uncertain fines, and a deed between the lord of the manor and the applicants was executed to that effect. The steward acted as attorney for the applicants in this particular transaction; and besides charging them a sum of 50*l.* for costs as attorney, he exacted an amount of 150*l.* in lieu of fees, which he claimed as compensation for the loss of fees on the transaction as steward. On communication with the lord of the manor, it was ascertained

If an attorney receives, in the character of steward, money from his client, which it is suggested was improperly so received, the Court will not compel him, summarily, to refund it.

1841.
 {
 Ex parte
 FAITH
 and Another.

that he had no right to those fees. The object of the present application was to compel him to refund the latter amount.

WIGHTMAN, J.—Having received that sum as steward?

M. Chambers. He was acting as attorney for the applicants at the same time that he received it.

WIGHTMAN, J.—I don't think that the accidental circumstance of a steward acting as an attorney at the time of receiving certain money in the character of steward renders him liable to be called on summarily to refund that money. I think that would be carrying the cases much further than any of them have hitherto gone.

Rule refused (a).

(a) See *Ex parte Corpus Christi College*, 6 Taunt. 105, as to the summary jurisdiction of the Court over a steward who is also an attorney.

Ex parte WATKINS.

Where an attorney applies to be struck off the rolls at his own request, the affidavit supporting the application, must be stamped.

WARREN applied, at the instance of an attorney, that he might be struck off the roll, he being desirous of leaving the profession. The affidavit, on which the facts supporting the application were stated, was not stamped; and after the decision of the matter of *Templeman v. Reed*(a), such an affidavit ought to be stamped, according to the provisions of the 55 Geo. 3, c. 184, notwithstanding the 5 Geo. 4, c. 41.

COLERIDGE, J.—I find, on inquiry from the Master, that such an affidavit has always been required to be stamped.

Application refused.

(a) *Ante*, p. 962.

1841.

MIERS v. LOCKWOOD.

WARREN shewed cause against a rule nisi, obtained by *C. Jones*, calling on the plaintiff to shew cause why the replevin bond in this case should not be set aside, or, in the alternative, why proceedings thereon should not be stayed on payment of 12*l.* 7*s.*, the appraised value of the goods distrained, together with the costs of assigning the bond. It was an action brought on a replevin bond. The bond was dated on the 17th September, 1840, and assigned February 1841. The amount of rent claimed was 13*l.*; the value of the goods distrained, as appeared by the appraisement, was 12*l.* 7*s.*; and the amount of the penalty in which the replevin bond was taken, was 50*l.* One of the terms introduced into the condition, besides the usual terms provided by the statute of the 11 Geo. 2, c. 19, s. 23, was, that the defendant should indemnify the sheriff for granting the replevin. The first objection to the bond was, that the penalty was taken in a greater sum than double the value of the goods distrained; and, secondly, that a term was introduced into the condition which was not authorized by the 11 Geo. 2, c. 19, s. 23. No doubt the section in question provided that the amount in which the bond was to be taken, should be in double the value of the goods distrained, and no provision was introduced, authorizing the sheriff to obtain from the person replevying a bond of indemnity; but, as against this defendant, the bond was valid to the extent of the penalty in liquidation of the rent due and the double costs. There was nothing in the section in question to prevent the sheriff from taking a bond conditioned in the manner here admitted. No authority could be produced which shewed that the bond must be in strict conformity with the terms of the statute. In *Austen v. Howard* (a) it was held that the bond might be given by

Where a replevin-bond was taken in a penalty, greater than the amount of goods distrained, and with a clause in the condition to indemnify the sheriff for granting the replevin, and it appeared that the bond had been executed in September, and assigned in February, but no application to set it aside was made till Easter Term, the Court refused to set it aside on those grounds, but intimated that it was objectionable that the bond should be taken in such an amount, and that the frequent practice so to do, and the delay, were the only causes for not interling to set it aside.

The terms on which the Court will stay proceedings on a replevin-bond at the instance of the sureties are the payment of the appraised value of the goods, if that is less than the amount of rent due, the double costs, and the

costs of the application.

(a) 7 Taunt. 28; See *Hucker v. Gordon*, 3 Tyr. 107.

1841.
 MIERB
 v.
 LOCKWOOD.

only one surety. In *Dunbar v. Dunn* (a), the marginal note was, "a sheriff taking a bond with sureties from a tenant replevying his goods distrained for rent, is not bound to pursue, in every respect, the terms of the 11 Geo. 2, c. 19, s. 23; and a bond conditioned to prosecute the action with effect, and to indemnify the sheriff is good, and may be assigned and proceeded on in the name of the assignee under the statute, although it does not require by the condition, that the suit shall be prosecuted 'without delay,' and although it contains an undertaking to indemnify the sheriff." That was a decision on error in the Exchequer Chamber, and the Court finally declared, "that the condition to indemnify the sheriff was consistent with the established forms of replevin-bonds as used in practice; and that there was no necessity to pursue so strictly, as it had been urged, the defendant ought to have done, the language of the statute in taking such bonds, as the 11 Geo. 2 had not declared, that bonds taken in any other than a presented form, should be void. They observed that the form of the bond now in use was common before the statute, and the condition was in every respect reasonable and unobjectionable; and that the sheriff would be also entitled to take another bond for his own indemnity, if that part of the condition, which was now objected to, were to be excluded; the effect of which would be to put the party to the expense of two bonds." Again, in *Short v. Hubbard* (b) it was held, that a replevin-bond taken by the sheriff, and conditioned for appearance at the next county Court; prosecuting the plaint with effect; making a return if adjudged; and indemnifying the sheriff from all charges and damages by reason of the replevin, was authorized by the above statute. Then as to the amount of the penalty which it was suggested was excessive. In the cases of *Evans v. Brander* (c), *Concanen v. Lethbridge* (d), *Baker v. Garratt* (e),

(a) 10 Price, 54.

(c) 2 H. Bl. 547.

(b) 2 Bing. 349; 9 Moo. 667;
 10 Moo. 107.

(d) 2 H. Bl. 36.

(e) 10 Moo. 324; 3 Bing. 56.

and *Ward v. Henley* (a), the amount of the penalty of the bond was greater than double the value of the goods distrained, and yet no objection was taken to the bond on that account. If it had been regarded as an objection, it would, no doubt, have been taken. These two classes of cases, therefore, shewed, on the one hand, that it was not objectionable for a sheriff to introduce a clause for his own indemnity into the condition, and on the other that there was no objection to taking the bond in a penalty more than double the amount of the goods distrained. So far as to the first clause of the rule, which referred to the supposed irregularity in the bond. Then as to the terms on which the proceedings in the action might be stayed. It appeared, by the affidavits, that the action was tried on the 1st December, 1840, and a verdict found in favour of the former defendant. Judgment was signed, and the costs were taxed at 97*l*. No part of that sum, or the value of the goods, had been paid. A writ of *retorno habendo* issued, and the return to it was that the goods had been *eloigned*. In the case of *Hunt v. Round* (b), Mr. Justice Patteson was of opinion, that the terms on which the proceedings in such an action as the present might be stayed, were the payment of the value of the goods distrained, the double costs and the costs of the application. The case of *Gingell v. Turnbull* (c) was not inconsistent with his Lordship's view.

1841.
 MIERES
 v.
 LOCKWOOD.

COLERIDGE, J.—Suppose, instead of the clause of indemnity being introduced into this bond, a second bond had been taken, could that bond have been assigned? Suppose a person came to the sheriff for a *replevin*, and he said he was willing to give a bond in double the amount of the goods distrained, could the sheriff say that he would not grant a *replevin* unless a bond in a greater amount was given?

(a) 1 Y. & J. 285.

(c) 3 Bing. N. C. 881; 5 Scott, 153.

(b) *Ante*, vol. 2, p. 558.

1841.
MIEBS
v.
LOCKWOOD.

Warren. Whether the sheriff would have power to do that was not necessary here to determine; but it was quite clear that the sheriff had a right to demand such a bond for his own indemnity. That was decided in the case of *Blackett v. Crissop* (a).

COLERIDGE, J.—I do not see what was the use of having the goods appraised if the value of them was immaterial.

C. Jones, in support of the rule, contended, that as the bond in question must have been considered as given under the authority of the statute, it was necessary to see what power was given by the statute to the sheriff in such a case. The object of the statute was to give the tenant an opportunity to try the right of the landlord to distrain the goods, if he gave adequate security to the sheriff for that purpose. The words of the statute were, “that all sheriffs and other officers, having authority to grant replevins, may, and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness, or witnesses, not interested in the goods or distress, which oath, the person granting such replevin, is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect, and without delay; and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress. The sheriff was, therefore, bound by the words of the statute to take the bond in double the value of the goods. If he was not, then he might render the statute a mere dead letter. Where the amount of the goods seized was only 5*l* he might demand a

(a) 1 *Ld. Raym.* 278.

bond for 1000*l*. It was true that a number of cases had been cited in which the question had not been raised, but none in which it had been: consequently no decision had been pronounced directly upon the point. In the case of *Evans v. Brander*, already cited, which was an action on the case against the sheriff for taking insufficient pledges in replevin, he was held to be liable in damages to the extent of double the value of the goods distrained, but no farther. There, the amount of the goods distrained was 17*l*. 5*s*. 3*d*., and the penalty of the bond 80*l*. The Lord Chief Justice inquired whether the bond, being taken in more than double the value of the goods distrained, according to the directions of 11 Geo. 2, c. 19, was good. The answer given by the counsel in the cause was, that it was good as against the sheriff. The question, therefore, as to the validity of the bond as against the person replevying, was not decided. The question, however, put by the Chief Justice, showed that he doubted the validity of such a bond; and the answer given implied an admission, that, as against the party giving the bond, it would not be good. Another part of the answer was, that this action was founded on the statute of the 13 Edw. 1, c. 2 (Westminster 2), and not on the 11 Geo. 2, c. 19; that there was no particular limitation of the sum in which those pledges should be bound. That also was an admission, that if the bond had been taken pursuant to the 11 Geo. 2, c. 19, it would not have been valid. The Court, too, intimated a strong opinion as the ground of recommending a settlement of the case, that as to the sureties, "their responsibility was limited by that statute, to double the value of the goods distrained, which sum ought to be the measure of damages against the sheriff." In the case of *Dunbar v. Dunn*, the question was not brought before the Court, and, therefore, that case did not affect the present. With respect to the point regarding the indemnity of the sheriff, the authorities seem to show that the sheriff might introduce a clause of indemnity into the condition. The question then was, supposing the Court to be of

1841.

MIEBA

v.
LOCKWOOD.

1841.
 {
 MIERS
 v.
 LOCKWOOD.

opinion that the bond was valid, on what terms the party could be relieved? It was submitted, that as the application was here made by the sureties, they would not be required to pay more than the value of the goods distrained, the single costs in the action, and the costs of the application.

Cur. adv. vult.

COLERIDGE, J.—This was a rule obtained for setting aside a replevin bond, or staying the proceedings thereon, upon payment of 12*l.* 7*s.*, the appraised value of the goods distrained, with the costs of assigning the bond. The irregularity alleged as the ground for the first alternative of the rule is, that the bond has been taken in a penalty of 50*l.*, the value of the goods being only 12*l.* 7*s.*, and the statute 11 Geo. 2, c. 19, enacting that it shall be taken in double the value of the goods distrained. The condition of the bond was not only for appearing and prosecuting the suit with effect and without dely, and for making return of the goods, if a return was awarded, but for indemnifying the sheriff for granting the replevin. It is, therefore, not simply a bond under the statute of Geo. 2. The practice of adding the condition for the sheriff's indemnity is not only frequent but of long standing. In *Morgan v. Griffith* (a), I find it stated by Lee, Ch. J., in delivering the judgment of the Court, that it is a condition in all replevin bonds; and as this judgment was delivered in M. T., 14 Geo. 2, only three years after the passing of the statute of the 11 Geo. 2, c. 19, the practice had probably been in existence before, and was not affected by it. It would certainly, therefore, not be proper for me to set aside this bond, on account of the insertion of this condition; and if so, I think it equally follows that I ought not to set it aside on account of the penalty being increased beyond the amount specified by the statute. For, although it is not very easy to trace with certainty the practice as to sheriffs' bonds, and perhaps it

(a) 7 Mod. 380.

has not always strictly followed the several provisions of the statutes of Westminster 2, and 11 Geo. 2, c. 19, yet I think it appears that the sheriff has been long allowed to take but one bond under both; and if he may insert more in the condition than the latter statute alone authorizes, there is nothing unreasonable in allowing him to add to the amount of the penalty in proportion. No case was cited in which the Courts have set aside a bond for this irregularity; although in many cases which have been brought before them, and which have been cited in the argument, the same ground of objection existed. Whether such a bond as this is properly assignable, and, if assignable, to what extent the assignment will operate, are very different questions, which, however, I do not feel myself called upon to decide on the present motion. The bond was executed in September last, and assigned in February, and it appears, by the affidavits, that the proceedings commenced in that month. If, therefore, the obligors wished to set it aside for any irregularity, or non-compliance with the statute, by the summary interference of the Court, they were bound to make their application more promptly (*a*). I wish, however, to be understood as in no respect sanctioning the practice. On the contrary, it seems to me very objectionable for the sheriff, as a public officer, not to abide by the plain directions of the statute. He can incur no risk if he does, and acts with common prudence; and it might lead to oppression, if he could refuse a replevin, because the owner of the things distrained was not in a condition to find sureties to a large and indefinite amount. I only refuse to interfere in this way, on account of the frequency of the practice and the lateness of the application. It remains to consider the latter branch of this rule: on what terms the proceedings may be stayed. It seems to me, that my Brother *Patteson* has laid down the true rule in this matter, founded on the right principle, in the case of *Hunt v. Round* (*b*). The replevin deprives the landlord

1841.
 MIERB
 r.
 Lockwood.

(*a*) This rule was obtained in Easter Term.

(*a*) *Ante*, vol. 2, p. 558.

1841.
 MIERB
 v.
 LOCKWOOD.

of the security of the goods distrained, and the statute 11 Geo. 2, c. 19, was passed to prevent vexatious replevins; and it gives the landlord the security of the two sureties and the double costs; but that is still with reference to the two objects, the amount of the rent and the value of the goods. If the rent is less than the value of the goods, the object of the statute is satisfied, by giving the amount of the rent and the double costs; if the amount of the rent exceeds the goods, then, in order to satisfy it, the landlord is entitled to the value of the goods, with the costs, as before. In this case, the rent is 13*l.*, the goods have been appraised at 12*l.* 7*s.*, and no question has been raised on the valuation. On payment, therefore, of 12*l.* 7*s.*, with double costs, and the costs of this application, let the latter branch of the rule be made absolute.

Rule accordingly.

BLUNT v. HASLOP.

(Before the four Judges.)

In an action on an attorney's bill, the day on which it is delivered, is not to be reckoned as one of the days of the month given to the client by the statute.

ASSUMPSIT on an attorney's bill for business done in the courts of law and equity. Plea, that the bill was not duly delivered according to the statute, one month before action was brought. Issue thereon. A verdict was taken for the plaintiff, subject to an application to enter a nonsuit, on the ground that the action had been brought too soon. It was proved that the bill was delivered in the course of the 12th of January: the action was brought on the 9th of February. A rule for a nonsuit having been obtained,

Channell, Serjt., shewed cause. The question is, whether the day of the delivery is to be reckoned inclusive or exclusive? If the former, the action is well brought. It ought to be so reckoned. Where computation of a day is to be made from an act done, the day on which the act is done, is to

be included in the reckoning. Therefore, when the law requires a month's notice of action to be given, the month begins with the day on which the notice is served. *Castle v. Burditt* (a), *Glassington v. Rawlins* (b). The mode of reckoning the time must depend on the reason of the act, and on the circumstances, *Lester v. Garland* (c). And, therefore, notice of an offence under the 9 Geo. 1, c. 22, given to the hundred two days after the fire happened, was held to be time, *Pellew v. East Wonford* (d); and in trespass against a justice of the peace for false imprisonment, it appeared, that the plaintiff was discharged from prison on the 14th of December, and the writ issued on the 14th of June; and it was held, that the action was commenced within the six months, *Hardy v. Ryle* (e). Here the circumstances show a sufficient means of taxation given to the defendant, the object of the statute has been fulfilled; and the action is maintainable.

1841.
BLUNT
v.
HASLOP.

Alexander and *Butt*, in support of the rule. The statute requires that the party shall have the best means of inquiring into the reasonableness of the charges, and must be construed as favourably as possible for him: thus, the leaving a bill at his house, or counting-house, is not enough, it must be left with him, *Brooks v. Mason* (f), *Hill v. Humphreys* (g). In computing the time of credit on a mercantile contract, the day on which the contract is made is to be excluded from the reckoning, *Webb v. Fairmaner* (h). There, *Lester v. Garland* was referred to by *Parke, B.*, as settling the principle, that the day on which the contract was entered into ought to be excluded; and *Pellew v. Wanford* is, in like manner, an authority against the plaintiff in this case. The principle laid down in the cases now cited must be applied here.

(a) 3 Term Rep. 623.

(b) 3 East, 407.

(c) 15 Ves. 248.

(d) 4 Man. & Ryl. 130; 9
Barn. & Cress. 134.

(e) 4 Man. & Ryl. 295; 9
Barn. & Cress. 603.

(f) 1 Hen. Bl. 290.

(g) 2 Bos. & P. 343.

(h) 6 Dowl. P. C. 549.

1841.

BLUNT

v.

HASLOP.

Lord DENMAN, C. J.—This action was brought too soon. The statute says, that the party is to have one month after the delivery of the bill. If the day on which the delivery takes place is to be reckoned as part of the month, then he will not have the full time; and it is better that that portion of a day should be given in, than that he should be deprived of part of the time which the statute says he shall have.

The other Judges concurred.

PER CURIAM.—Rule for a nonsuit absolute (a).

(a) See *Young v. Higgon*, ante vol. 8, p. 212, where it was held, that in a notice of action against a magistrate under 24 Geo.2, c. 44, s. 1, the time must be computed exclusive both of the day of giving the notice and bringing the action.

KNIGHT v. THYNNE.

Bail in error is not necessary, when the writ is of error, coram nobis; as it is not a supersedeas of execution, but the plaintiff may apply to the Court for leave to take out execution, which will be granted according to circumstances.

PLATT shewed cause against a rule obtained by *W. H. Watson*, for drawing up the rule for the allowance of a writ of error, coram nobis, without putting in bail. It appeared, from the affidavits, that Lord Edward Thynne granted an annuity to Sir William Rawlings, during the joint lives of Sir William Rawlings and Lord Edward Thynne. Mr. Thomas Duncombe joined with Lord Thynne in a warrant of attorney, to secure the payment of the annuity. Judgment was signed on this warrant in the year 1834. Since then, a sum of between 1,700*l*. and 1,800*l*. became due on the annuity deed. Sir William Rawlings died; and the judgment was now revived by scire facias, at the instance of the executors of Sir William Rawlings. A writ of error, coram nobis, had been sued out by Mr. Duncombe, on the ground of error in process, the objection being that it appeared by the judgment, that the defendant had been brought into Court by bill, that species of proceeding having been abolished in the year 1834, by the provisions of the Uni-

formity of Process Act. The first objection to this writ of error was, that in the warrant of attorney was contained a release of all errors. That alone was a sufficient answer to the application. Secondly, that the statutes of the 3 Jac. 1, c. 8, and the 6 Geo. 4, c. 96, clearly required bail to be given in this species of writ, as well as in any other.

1841.
 KNIGHT
 v.
 THYNNE.

WIGHTMAN, J.—The cases of *Gibbs v. Trevanion* (a), and *Levi v. Price* (b), are cited as authorities in support of the application.

Platt contended, that if those decisions were right, the defendant need not have come to the Court for the purpose of obtaining the rule for the allowance of the writ of error.

WIGHTMAN, J.—It is not so clear, as the officers have a doubt, and, therefore, do not like to draw up the rule for the allowance, without leave of the Court.

W. H. Watson, in support of the rule, submitted that it was quite clear the statutes in question did not apply to cases of error in fact. The case of *Gibbs v. Trevanion* was an authority to that effect, with regard to error coram nobis. In *Levi v. Price*, the Court of Exchequer held that a writ in error coram vobis was equally unnecessary. The case of *Birch v. Triste* (c) was to the like effect.

WIGHTMAN, J.—It depends upon whether the writ of error is a supersedeas or not. If it is a supersedeas, the defendant should put in bail; if not, there is no reason why he should.

W. H. Watson.—The statutes only applied to those cases where there was an appeal from one Court to another;

(a) *Ante*. vol. 8, p. 140.

(c) 8 East, 412.

(b) *Ante*, vol. 5, p. 775.

1841.

KNIGHT
v.
THYNNE.

but where there was no such appeal, and the Court merely sought to correct its own records, bail was unnecessary.

WIGHTMAN, J.—In the case of *Birch v. Triste*, Lord *Ellenborough* says, “A writ of error coram nobis is not a supersedeas in itself; but although it be not, execution cannot be taken out while it is depending, without leave of the Court. It would be very unreasonable that it should be in the power of the plaintiff to take out execution upon the judgment, without leave of the Court, where a question is depending concerning a fact, by which, if it be true, the plaintiff’s right of action will be destroyed. This reasoning does not apply to the case of a writ of error within the statute, where the plaintiff has had, or might have had the benefit of it as a supersedeas, but for his own act in determining it.” Again, his Lordship says, “In error of matter of fact, coram nobis, which is not within the statutes requiring bail in error, the writ of error is not of itself a supersedeas in the first instance; but is or is not so according to the circumstances; and those circumstances the Court will inquire into, on motion for leave to take out execution. In case, therefore, of error brought coram nobis, the practice is, that the defendant in error shall move the Court for leave to take out execution. That is so laid down in *Ribout v. Wheeler* (a).” This is not error in fact, but error in process; but such error would have the same effect as error in fact. Mr. Tidd, in his practice, vol. ii. p. 1154, 9th ed., also lays it down that a writ of error coram nobis or vobis “is or is not a supersedeas of execution, according to circumstances.” I cannot distinguish this case from those in which it has been determined that bail in error is not required in cases where the writ of error, being coram vobis or nobis, is not a supersedeas of execution; but the plaintiff may apply to the Court to take

(a) Sayer, 166.

out execution, and the Court will grant it according to circumstances. I will, however, consider the case.

1841.
KNIGHT
v.
THYNNE.

Cur. adv. vult.

WIGHTMAN, J.—This was a question whether it was necessary to give bail in error on a writ of error coram nobis. Several cases were cited, and particularly the cases of *Birch v. Triste* and *Levi v. Price*, where it was considered that neither the statute 3 Jac. 1, nor 6 Geo. 4, applied to writs of error coram nobis or vobis. On the other hand, the case of *Semple v. Turner* was cited, in which it was held that a writ of error is not a supersedeas of execution of itself; but then it is thus far a supersedeas, that the plaintiff below cannot take out execution without the leave of the Court. I think, therefore, that the rule must be made absolute for drawing up the rule for the allowance of the writ of error, without putting in bail.

Rule absolute.

Exparte The Guardians of WALLINGFORD UNION.

GRAY moved for a rule to shew cause why a writ of mandamus should not issue, directed to the justices of the borough of Wallingford, commanding them to hear and determine an application for a bastardy order, at the instance of the guardians of the Wallingford Union. It appeared that the union in question had been formed pursuant to the provisions of the 4 & 5 Wm. 4, c. 76. Within it, were included certain parishes in Oxfordshire, Berkshire, and the borough of Wallingford, which also was within the limits of the county of Berks. Among the parishes made for such an order, and the justices of one division declining to make it, on the ground that they had no jurisdiction in another: a rule for a mandamus to compel them to make it was discharged.

A poor law union consisted of several places, over which different divisions of justices had jurisdiction: *Quære*, whether a bastardy order can be made by one division, where the child has become chargeable in another. An application having been

1841.
Ex parte The
Guardians of
WALLING-
FORD UNION.

in the county of Oxford included in the union, was the parish of Warborough. A bastard child having been born there, and become chargeable, the guardians of the union applied on the 5th of February to the justices of the borough of Wallingford to obtain an order of filiation on the putative father, pursuant to the 4 & 5 Wm. 4, c. 76, s. 72, and the 2 & 3 Vict. c. 85, s. 1. The application having been heard, the justices were of opinion, that according to the provisions of the 2 & 3 Vict. c. 85, s. 1, they had not jurisdiction to make such an order. The object of the present application was to obtain the opinion of the Court as to the construction to be put on the statute, under the provisions of which the justices thought they had no jurisdiction.

Whitmore appeared to shew cause in the first instance. The words of the section in question were, that where any child has been born a bastard, and "shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the guardians of any parish, of the union in which any parish may be situate, or if there shall be no such guardians, then the overseers of such parish may, if they think proper, at any time within three calendar months after such child shall have become chargeable, apply to the justices of the peace holding any special or petty sessions in, and for the division or borough, within which such union or parish, or any part thereof, shall be situated, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such union or parish for its maintenance and support." It was contended, on behalf of the union, that the guardians might apply to any petty sessions for any borough within the union. If that construction was put upon the language of the section, considerable inconvenience would be the result. As by the third section, a right of appeal on certain terms to the quarter sessions might be exercised, a question would arise, in the present case, to what sessions the appeal ought to be made? Should it be

the quarter sessions of Oxfordshire or Berkshire? At present, the borough of Wallingford held no quarter sessions; but, if such a Court was held, could it determine an appeal over a matter which arose without their jurisdiction? If the provisions of the statute were still further considered, it would appear, that other difficulties would arise from adopting such a construction. No doubt the provisions of the statute were not clear; but the probability was, that the Legislature intended that the application should be made to the justices of the particular division in which the child became chargeable. In such a case of doubt, with respect to the jurisdiction of the justices of the borough of Wallingford, so clear a course as that suggested being consistent with the provisions of the statute, the Court would not issue a mandamus to compel the justices to hear the matter in question.

1841.

Ex parte The
Guardians of
WALLING-
FORD UNION.

Gray, in support of the rule, contended that although some inconveniences might arise from requiring the justices of the borough of Wallingford, in consequence of putting this construction upon the statute, that was no objection to giving effect to the clear language of the section. The statute gave an option to the guardians of the union to apply to the justices holding any special or petty session for the division or borough within which such union, or any part thereof, shall be situated. The Legislature might have had a reason for giving such a discretion to the guardians in the choice of the tribunal to which they should apply. As to the suggested difficulty, with respect to the appeal to the quarter sessions, that could not affect the question, because the appeal might be made to the quarter sessions of the county, within which the division, or borough was situated. On these grounds it was submitted, that the present rule ought to be made absolute.

Cur. adv. vult.

1841.
 Ex parte The
 Guardians of
 WALLING-
 FORD UNION.

COLBRIDGE, J.—This was an application for a mandamus to be directed to the justices of the borough of Wallingford, commanding them to hear and determine an application for an order of filiation, under the 2 & 3 Vict. c. 85. The parish to which the child has become chargeable, is Warborough, in Oxfordshire, and is within the Wallingford Union. Wallingford is in Berkshire, and has a separate commission of the peace, but no separate quarter sessions. The union also embraces other parishes in Berkshire. The statute enacts, sect. 1, that “the guardians of any parish, or of the union, in which any parish may be situate, or if there be no such guardians, then the overseers of such parish may,” at the time there stated, “apply to the justices of the peace, holding any special or petty session, in and for the division or borough within which such union, or parish, or any part thereof, shall be situated, for an order,” &c. These justices, it is argued, hold petty sessions for a borough, within which a part of the union is situated, and are, therefore, within the words of the act, and have jurisdiction. Moreover, unless the words “any part thereof,” refer to union as well as parish, no application can in any case be made, where, as in the present, the union is in more counties or divisions than one. There will be great inconvenience in many respects in construing these words with the literal strictness which this application requires. By the 2nd section of the act, any justice of the peace (the section in terms makes no limitation) may summon witnesses to appear, and give evidence on the charge, and upon neglect or refusal, may by warrant cause them to be brought before him; and then on proof of the service, and a tender of reasonable expenses, the justices before whom the charge shall be heard, may commit them to any house of correction within their jurisdiction, for fourteen days, or until they shall submit to be examined. If the borough magistrates proceed in this case, and witnesses are required from Oxfordshire, are they to issue their summons and

warrant into that county, or must recourse be had under the former part of the section to an Oxfordshire magistrate, to procure the attendance of the witness? And in case of refusal, must he turn the witness over to the borough magistrates, and if so, to what house of correction are they to commit? It is not stated that there is any house of correction for the borough or properly within their jurisdiction, nor do we know on what terms, and for what purposes, they have power to commit to the Berkshire house of correction. But if they have power to do so in a case like the present, which would seem very doubtful, there would be not a little hardship in committing an offender from one county to the prison, it may be in some cases the remote prison of another, or is it to be contended that a power, if given by implication to the borough justices to commit for this purpose to the Oxfordshire house of correction? Are the magistrates or the county gaoler to determine these nice points? Again, if under the 3rd section, the party charged shall decline the jurisdiction of the petty sessions, and elect to go before the quarter sessions, the words in the act are unlimited, and specify no particular county; to which quarter sessions are the borough magistrates to send the recognizance to transfer the hearing of the case? In that instance, there may be an election between two counties, but there might be borough quarter sessions also, and then the difficulty of determining would be increased; but, in either supposition, an extension of the jurisdiction of justices is to be made by mere implication, if the Berkshire magistrates are to try a case arising in Oxfordshire, and make an order to be acted on there, or if the Oxfordshire magistrates are to proceed with a matter commenced in Wallingford. I mention these difficulties, not as conclusive, nor as admitting of no solution; but if the statute presents another mode of proceeding equally convenient to the parties, and entirely free from any such difficulties, it would not be a vain exercise of the discretion of the Court to assist the applicants in their desire to pro-

1841.

Ex parte The
Guardians of
WALLING-
FORD UNION.

1841.
Ex parte The
Guardians of
WALLING-
FORD UNION.

ceed by this. Now there is nothing in the act from which an intention can be inferred to extend the local limits of the jurisdiction of magistrates; the language of the section in question seems rather framed with a contrary intention. Even where a whole union or parish is in one county, the power to hear the application is not given to the magistrates indifferently for the whole county, but is restrained to those who act in the particular division; and when it specifies division or borough wherein any part of the union or parish is situated, that may be, in order to carry out the same intention, and to direct that the application, *reddendo singula singulis* should be made, where the union was within more than one county, or division, to that bench, within the jurisdiction of which the cause of complaint arose. This act, it will be remembered, makes an alteration in the bastardy provisions of the 4 & 5 Wm. 4, c. 76, s. 72: by which section the application was to be made to the quarter sessions within the jurisdiction of which such parish or union shall be situate; and no provision was made for the case of a parish or union being partly within the jurisdiction of one, and partly of another quarter sessions. Probably, it was intended to guard against the consequences of any similar omission, which, under the present statute, might have occasioned inconveniences of frequent occurrence, that the language of this section was framed, but certainly not with sufficient care. I am not without an authority for saying that general words of an act of parliament, which, if construed literally, might extend the limits of the jurisdiction of magistrates beyond those of their commission, may receive a restrained construction. In Hilary Term last, the Lord Chief Justice of the Queen's Bench, in the case of *George Peerless*, to be found in the *Law Journal*, Vol. x. p. 4, held, that the words "any justice of the peace in the United Kingdom;" in the 3 & 4 Wm. 4, c. 53, s. 48, did not give jurisdiction to a magistrate beyond his own county. But I do not intend, by the course I now take, to decide absolutely the true construction of this act.

I only say, that when so much doubt exists, and so much inconvenience may follow from giving it the construction required to make this rule absolute, and where another construction may so well be maintained, and the course of proceeding upon that, is so free from difficulty; I think I exercise the wisest discretion in refusing the application, and discharging the rule, but without costs.

1841.

Ex parte The
Guardians of
WALLING-
FORD UNION.

Rule discharged without costs.

IVE v. SCOTT and Another.

KNOWLES applied for a rule to shew cause why the execution of the writ of inquiry, in this case, should not be set aside, and a new writ issued. It was an action of trespass for mesne profits, and, in the declaration, it was alleged that the defendant, on a certain day mentioned, but not stated under a videlicet, broke and entered the premises, &c., and ejected the plaintiff, and kept him out until a certain other day also mentioned, but not stated under a videlicet. The plaintiff proved costs to have been incurred in the action of ejectment, to the amount of 134*l.* 10*s.* No evidence, however, was produced, shewing that the defendant had been actually in possession, during the period alleged to the declaration which was about three years. The under-sheriff told the jury, that the plaintiff was only entitled to recover nominal damages for the issues and profits, beyond the amount of costs proved. According to this direction, the jury found a verdict. It was now submitted, that this direction of the under-sheriff was wrong, as the defendant, by suffering judgment by default, had admitted himself to be in possession during the period alleged in the declaration. If the time had been laid under a videlicet, this might not have been so, but not having been so alleged, suffering judg-

The day on which it was alleged the plaintiff was ejected by the defendant, and that when possession was recovered by the former, are not material in a declaration in trespass for mesne profits, although they are not stated under a videlicet.

1841.
 IVE
 v.
 SCOTT
 and Another.

ment by default, operated as an admission, that the defendant had been in possession during the alleged period.

WIGHTMAN, J.—If the day alleged in the declaration is material, suffering judgment by default is an admission that the defendant was in possession during the time alleged. In order, however, to render it material, the plaintiff must contend that if he had failed in proving the day alleged, he would have failed altogether. I am quite certain that it is not material, and, therefore, the defendant, in suffering judgment by default, had not made the admission suggested. It appears to me, therefore, that the direction of the undersheriff was correct. There must, consequently, be no rule.

Rule refused.

ANDERSON v. SOUTHERN.

A rule nisi to set aside an interlocutory judgment, with a stay of proceedings having been granted, the Court refused to make a rule to compute on that judgment absolute.

HOGGINS obtained a rule nisi, with a stay of proceedings, to set aside an interlocutory judgment, signed for want of a plea. It was an action on a bill of exchange, and it was positively sworn that a plea had been delivered before the judgment was signed.

C. Jones moved in the same cause to make a rule to compute absolute on affidavit of service.

WIGHTMAN, J.—The rule to compute cannot now be made absolute, as a rule nisi for setting aside the judgment, with a stay of proceedings, has been granted, is now pending.

Rule refused (a).

(a) See *Keily v. Villebois*, ante, vol. 8, p. 136.

1841.

STAITE v. HADDON.

OGLE shewed cause against a rule nisi, obtained by *Butt*, requiring the defendant's attorney to shew cause why he should not pay a sum of 220*l.*, the sum awarded by the arbitrator to be due to the plaintiff, and also a sum of 42*l.*, taxed costs, and the costs of this application. It was an action of covenant, and was referred, the attorney for the defendant undertaking to pay what should appear to be due to the plaintiff. The arbitrator, having heard the case, decided by his award, that the defendant was indebted to the plaintiff in the sum of 220*l.* As the costs were to abide the event, that created a still further liability in respect of them, and they were taxed at 42*l.* *Ogle* contended that the Court would not interfere in such a case, unless it appeared, first, that the party entered into the agreement as the attorney in the cause; and, secondly, that the party to whom the undertaking was given was interested in the proceeding. The facts of the case, as they appeared by the affidavits, were the following:—An action was commenced by *Staite* against *Haddon*; the latter resided in Scotland, and employed a person named Farquhar as his attorney in this country. After the cause had proceeded to a certain extent, a reference was proposed, to which *Staite* objected, on the ground that *Haddon* resided in Scotland, and, therefore, out of the jurisdiction. He, however, ultimately agreed that the cause should be referred, on condition that Farquhar, the attorney for the defendant, would give his undertaking to pay the amount of debt and costs, which the arbitrator should award to be paid by the defendant. The undertaking being given, the submission limited the arbitrator to the 1st of February, as the time for making his award. By some accident, he did not enlarge the time for making his award until that day had passed; and the reference still remaining incomplete, it was agreed between the parties that the time for making the award

Where an attorney undertook to pay the sum which should be awarded to be paid by his client in a particular reference, the arbitrator being to make his award by a particular day, but did not do so, and a judge's order for enlarging the time was made by consent, the attorney acting on that occasion for his client, the Court held him discharged from his undertaking, he not having recognized it after the original time for making the award had expired.

1841.

STAITE

v.

HADDON.

should be enlarged. On the 18th of February, a Judge's order to that effect was drawn up, "By consent of the attorneys or agents on both sides." Subsequently, the arbitrator made his award, and directed the defendant to pay the plaintiff the sums already mentioned. The present application was in the nature of an attachment; and, therefore, in order to entitle the plaintiff to succeed on this rule, it must be shewn that a demand was made of performance of the undertaking. No such demand appeared. Again, it was not shewn that any default had been made in the performance of the award by Haddon, the principal; that ought to be shewn, before Farquhar could become liable, as at most he stood in the situation of a surety. In all declarations against guarantees, it was necessary to show the non-performance of the matter in question, by the principal. In *Batesby v. Brooksbeck* (a), it was held that in an action against a surety, the declaration must aver that the principal has not performed a condition. That was the situation of Farquhar in the present case. The award required certain sums to be paid by Haddon to the plaintiff. Before Farquhar could become liable to pay those sums, pursuant to his undertaking, a demand ought to be made upon Haddon for payment. No such demand was disclosed on the affidavits in this case; and, for anything that appeared, these proceedings were without the knowledge of Haddon. It did not even appear that Haddon was aware of any award having been made. Then, the enlargement of the time for making the award, under the circumstances, clearly discharged Farquhar from his undertaking. The award was to be made by a certain time; and, on the faith of its being made by that time, the undertaking was given by Farquhar. He did not undertake to pay, although the arbitrator enlarged the time for making his award, after the time originally limited for making it had elapsed. With respect to the Judge's order, which had

(a) Cro. Jac. 500.

been made for enlarging the time to make the award, that could not affect the rights of Farquhar, who was no party to the enlargement. It was true, that he had acted as attorney on the occasion, as he did during the remainder of the proceedings in the cause. Acting in that manner did not operate as a revivor of his undertaking. For a fortnight or three weeks, his undertaking had been mere waste paper, and could not be revived without a fresh undertaking. In acting as attorney, and as attorney consenting to the enlargement of the time for making the award, he merely performed his duty as attorney, and did not do any act which could in any way operate to revive the undertaking. Under these circumstances, it was contended, that the present rule ought to be discharged, and with costs.

1841.

STATTE

v

HADDON.

Butt and *Henderson* supported the rule, and contended that as the order for enlarging the time to make the award had been made by consent of the attorneys or agents on both sides, Farquhar must have been perfectly cognizant of the enlargement. As he acted in the character of attorney, it would be presumed that the enlargement took place with his consent and knowledge. If not, that fact ought to be shown by the other side. That, however, was not done. In order to give effect to the enlargement, as against Farquhar, it was not necessary that it should be signed by him, or be in writing. The case of *Kite v. Millman* (a), shewed that an attorney might be compelled to fulfil a verbal undertaking to pay damages and costs on behalf of his client, where the other party had been induced to consent to take a verdict for a certain sum, instead of going to the jury. This and other cases shewed that the Courts were not very strict in construing undertakings of this description, so far as the form was concerned. [*Cole-ridge*, J.—That is so, as undertakings void by the statute of frauds may be enforced against attorneys.] The attorney

(a) 2 M. & Scott, 616.

1841.

STAITE
v.
HADDON.

in the present case had himself persuaded the plaintiff to refer; and that gentleman only gave his consent so to do, on the express undertaking of Farquhar to be answerable for the sum awarded by the arbitrator against the defendant. Not fulfilling that undertaking was, under all circumstances, at least a moral breach of his undertaking, and ought, therefore, to be enforced by such an application as the present.

COLERIDGE, J.—I have listened to the answer given to the objection raised on the part of Farquhar, and I have no doubt that the rule must be discharged. It is an application to compel an attorney to perform his undertaking, which could not otherwise be enforced, if he was not an attorney. The facts of the case are as follow:—There was an action between *Staite* and *Haddon*, the latter being the client of Farquhar, and being resident in Scotland. Putting the case in the strongest point of view against the latter, I will take it that he persuaded the plaintiff to become a party to the reference, although he objected at first to do so, on the ground that Haddon resided in Scotland, and that the plaintiff refused to refer, unless Farquhar gave his undertaking. An order was accordingly drawn up, and the undertaking was given. But what was the undertaking to do? To perform the award; but that was to be made pursuant to this submission, and, therefore, ought to have been made within the time limited, which was the 1st February. The arbitrator neglected to enlarge the time for making his award, before that day. What then was the situation of Farquhar on the morning of the 2nd of February? Could it be said that his undertaking could be then enforced? No doubt he then stood absolved from it. The case stands in that position until the 18th February. Now, again, assuming the facts in the strongest way against Farquhar, and taking it, that he was renewing his application to the other party to go on with the reference; and that he consented to the order of enlargement being made,

what was his situation? His written undertaking was gone for some days before that time. Now, admitting that it was not necessary that the undertaking should be in writing, as has been urged, how am I to infer that he gave any new undertaking, or consented to renew the old one, merely because he acted as attorney in the matter? I am not at liberty to proceed on this application by mere guess; but I must see clearly that he has given his consent to the renewal of his undertaking. Everything that was done afterwards, was done as attorney in the cause. But giving this undertaking is not incident to his office of attorney, though the remedy on it is against him in that character. It is not because he does act as attorney that he is to be considered as giving a fresh undertaking. The rule must, therefore, be discharged with costs, as it was moved with costs.

1841.
 STAFFE
 v.
 HADDON.

Rule discharged with costs.

DOE d. EVANS v. ROE.

TYRWHITT applied for leave to sign judgment against the casual ejector. The notice at the foot of the declaration required the tenant to appear "in her Majesty's Court of Common Bench," the action being brought in this Court. The declaration was, however, entitled regularly, "in the Queen's Bench." The service was, in every other respect, regular. The error in the notice was, under the circumstances, not material.

WIGHTMAN, J.—I think you may have a rule nisi for judgment.

Rule nisi granted.

The Court granted a rule nisi for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear in the "Common Bench," instead of the "Queen's Bench:" the declaration being entitled in the "Queen's Bench."

1841.

HUMPHREYS v. BUDD.

Judicial notice will not be taken by the Court that a particular street is not in a certain county, although it may be generally known to be situated in another.

HEATON applied for a rule to shew cause why the service of the writ of summons in this case should not be set aside for irregularity. The objection was, that the plaintiff's attorney, who indorsed his name on the writ of summons, described himself as of "1, Featherstone-buildings, Holborn, in the county of Surry." It was well known that the place and street described in this indorsement were in the county of Middlesex, and not in the county of Surry. This, therefore, was a non-compliance with the 2 Wm. 4, c. 39, s. 12, by which it was required that every writ issued by the authority of that act "shall be indorsed with the name and place of abode of the attorney actually suing out the same." It was admitted that no affidavit had been made that Featherstone-buildings, Holborn, was not in the county of Surry, or that there was no such place in that county.

WIGHTMAN, J.—I cannot take judicial notice that there is no such place in the county of Surry; and, therefore, I cannot grant the present rule.

Rule refused (a).

(a) See 2 Inst. 557.

SPRIGGINS v. WHITE.

Where it is questionable whether sufficient notice has been given to the defendant of a declaration having been

filed, the plaintiff must sign judgment for want of a plea at his own peril, and the Court will not assist, by giving him leave to take such a proceeding.

WARREN applied for leave to sign judgment for want of a plea. The affidavit on which he applied stated a personal service of the writ of summons on the defendant; that the plaintiff had entered an appearance for him accord-

ing to the statute, and filed a declaration. A number of circumstances were then stated in the affidavit, the effect of which was to shew that the defendant had received notice of the declaration being filed. The object of the present application was to obtain the sanction of the Court for signing judgment, for want of a plea, under the special circumstances stated with respect to the notice of declaration.

1841.
 SPRIGGINS
 v.
 WHITE.

WIGHTMAN, J.—Why should this application be made to the Court? The plaintiff must judge for himself, whether he has given notice to the defendant of declaration having been filed, and must sign judgment at his own peril, if he thinks he has a right so to do. It is quite unusual for such an application to be made.

Rule refused.

REGINA v. SNEYD and Another.

CRESSWELL and *Godson* shewed cause against a rule nisi, obtained by *V. Lee*, calling on the defendants, who were justices of the county of Stafford, to shew cause why a writ of certiorari should not be granted to bring up an order for the appointment of certain overseers for the township of Onecot, in the city of Stafford. The facts of the case appeared to be, that regular notices having been given that a petty sessions would be held for the appointment of overseers for the district in which Onecot was situated, on the 31st March, certain justices assembled, and having appointed twenty or thirty overseers, some questions arose as to the fitness of certain persons in the township to act as overseers: they then adjourned the question until the 14th of April. One of the justices, who was present on this occasion, imagining that this adjournment was not good, day of adjournment was held good, as the sessions had become possessed of the subject matter: and other appointments made for the same township by other justices, within fourteen days after the 25th March, invalid.

Where justices met in petty sessions to appoint overseers, in due time, after the 25th of March, pursuant to the 54 Geo. 3, c. 91, and, in consequence of a difficulty with respect to certain appointments, they adjourned the consideration of those appointments to a day more than fourteen days from the 25th of March, an appointment made with respect to them on such

1841.
 REGINA
 v.
 SNEYD
 and Another.

and, as the 14th April was more than fourteen days from the 25th March, within which time, pursuant to the provisions 54 Geo. 3, c. 91, the appointment of overseers must take place, he proceeded to a place called Frog Hall, and the next day, the 1st of April, appointed two overseers for the township of Onecot. Pursuant to the adjournment of the 14th April, certain justices assembled and made an appointment of overseers for the township of Onecot. The object of the present application was, to remove the second appointment into this Court, in order to quash it, on the ground that having been made subsequent to the appointment of the 1st of April, it was invalid. It was submitted, however, that the second appointment was valid, and the first invalid. On the 31st March, the justices having assembled for the purpose of appointing overseers for this township among others, and finding some difficulty with respect to this particular appointment, as to the persons within the township who were fitted to hold the office of overseer, they adjourned the question. In so doing, they had possessed themselves of the matter, their jurisdiction attached, and, therefore, it was competent for them to adjourn it in the manner stated. Having adjourned it, it was not competent for any other justice to interfere, to make an appointment of overseers. The appointment, of the 1st April, was, consequently, a mere nullity. In *Rex v. Sainsbury (a)*, the marginal note was, "Where two sets of magistrates have a concurrent jurisdiction, and one of them appoints a meeting to grant ale licences, their jurisdiction attaches, so as to exclude the others from appointing a subsequent meeting; but they may all meet together on the first day; but if after such appointment the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and the subject of an indictment." There, Lord *Kenyon* said, "A question has arisen, and which is proper should be

(a) 4 T. R. 451.

settled, whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public, that the acts of magistrates should not only be substantially good, but, also, that they should be decorous. The facts in the case are shortly these: Some of the justices for the county of Surrey having before them the statute of 26 Geo. 2, and knowing that the licences ought to be granted on a certain day and time, appointed a day, the 24th September, for licensing ale-houses in this division, on which day they accordingly held their meeting; and certain of the magistrates of the city of London, who, in general, are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting, had attached before this time; not, indeed, so as to exclude the city justices from acting at the first meeting, for they might all have acted together, but it excluded the city justices of their jurisdiction to act on the subsequent day. On the general question, therefore, I am clearly of opinion, that the Surrey justices, and the magistrates for the city, have a co-ordinate jurisdiction within this district; and that the meeting of the city justices, in this case, was illegal, the jurisdiction of the other magistrates having first attached." Judgment was ultimately given for the crown. The words of the 54 Geo. 3, could only be considered as directory to the justices; and, if the appointment was not made within the fourteen days limited by the statute, the justices might still appoint overseers; and if they did not, the Court would compel them so to do by mandamus. In 1st *Nolan's Poor Laws*, page 45, 4th edition, it was laid down, "This appointment, under the 43 Eliz. c. 2, was to be made yearly, in Easter week, or within one month after Easter; but now, by the 54 Geo. 3, c. 91, is directed to be made on the 25th day of March, or within fourteen days

1841.
 REGINA
 v.
 SNEYD
 and Another.

1841.
 REGINA
 v.
 SNEYD
 and Another.

next afterwards. If neglected, the justices dwelling within the division, and every mayor, alderman, and head officer of city, town, or place corporate, where the default shall happen, is to forfeit 5*l*. for every such default, to the relief of the poor, to be levied by the parish officer by distress, under a warrant from the quarter sessions. But the 43 Elizabeth was only directory in this respect. The Court of King's Bench, therefore, refused to quash an appointment, because subsequently made. For the act has no negative words restricting the power to a month after Easter, and should be continued, so as to destroy the mischief, and advance the remedy, which was, to have proper officers set over the poor. But, if a subsequent appointment was to be void, it would subject the parish to the inconvenience of wanting overseers, by a default of the justices, which it was not in its power to prevent. This principle seems to apply equally to appointments under the 54 Geo. 3, c. 91. So that, if the fourteen days after the 25th of March, within which the appointment is directed to be made, should expire, and no officers be appointed, the Court upon application would probably grant a mandamus to compel the magistrates to make one." It was, therefore, perfectly clear that the justices who made the appointment on the 14th April, were the only persons competent to make such an appointment, and the fact of the fourteen days after the 25th March having expired, did not affect its validity.

V. Lee and *Whitmore* supported the rule, and contended that the priority of the appointment on the 1st April, rendered that the valid appointment; and that it was incompetent for the justices before whom the matter had already been, to proceed to make an appointment on the 14th. With respect to the *King v. Sainsbury*, cited on the other side, it did not affect the question, because, in that case, an actual decision had been pronounced by the magistrates, before whom the matter had come. Here, however, no decision had been pronounced, but the matter still remained

open for the determination of the justices. In the case of the *King v. The Inhabitants of Great Marlow* (a), it was held, that after an appointment for overseers for a parish by the magistrates, at one meeting, they are functi officio; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. That was an authority to show, that after the appointment on the 1st April, the justices had no power to appoint on the 14th. The case of the *King v. The Overseers of Bridgewater* (b), supported that view. In 1st *Nolan's Poor Laws*, page 55, 4th ed., it was laid down, "When an appointment is once legally made, the magistrates are functi officio. If two appointments, therefore, each being a sufficient number of overseers, are made on the same day, that which is prior in time is good, and the second void. And other magistrates are not only disabled from making a new appointment; but if a person who has been appointed applies to them to be exempted upon sufficient cause, they cannot remove him and substitute another in his place; but he must appeal to the sessions for his discharge." On these authorities, it was submitted that the present rule ought to be made absolute.

1841.
REGINA
v.
SNEYD
and Another.

COLERIDGE, J.—One question in this case, is, whether the appointment of the 14th of April was a valid appointment? I think I am bound to decide that question first. It may be urged that the first appointment being made, the second is made out of time. I do not think that proposition can be sustained; although the appointment is required to be made by the 54 Geo. 3, c. 91, within fourteen days after the 25th of March, yet the general rule is, that where such a provision is introduced, unless there are negative words in the statute, providing that the appointment shall not take place afterwards, such a provision

(a) 2 East, 244.

(b) 1 Cowper, 139.

1841.
REGINA
v.
SNEYD
and Another.

is to be taken as directory. That was the construction put upon the 43 Eliz., and writs of mandamus have been issued, requiring magistrates to make appointments of overseers, the issue of which writs must have proceeded on the ground that the words of the statute were directory. No negative words are introduced into this statute, therefore, its language must be regarded merely as directory. I cannot but think, that, if the magistrates had heedlessly and thoughtlessly allowed the time for appointing overseers, as limited by the act of Parliament to pass, and had proceeded to the appointment on the 14th of April, it would have been a perfectly valid appointment. The question then is, whether, the appointment of the 1st of April is a valid one? Now, I do not think that the appointment made first in point of time is necessarily valid in point of law. The magistrates have met pursuant to notice. They make various appointments. They differ as to this, and four or five others. By the consent of all present, and among others of Mr. Sneyd, the matter is adjourned until the 14th of April. That being done, I think they had obtained possession of the subject matter, and, therefore, had jurisdiction over it. Suppose, that on the 31st of March, they had adjourned to any day within the fourteen days after the 25th of March, would it have been competent for any two magistrates to go during that time, and make another appointment of overseers? I think not. I think that is precisely the same when you get over the difficulty of the question as to the adjournment, whether the adjournment was within the fourteen days or not. Upon its being made known to Mr. Sneyd, that the adjournment for such a length of time might be irregular, the proper course for him to pursue would have been to inform his brother magistrates of the fact, and proceed or not with the appointment of overseers, in any way they thought proper; but without doing so, he goes to another place, and without the knowledge of his brother magistrates, assists in making the

appointment on the 1st of April. He had no right to do that. As I hold the appointment on the 14th to have been valid, the appointment of the 1st of April was irregular. I think, therefore, that the present rule ought to be discharged, but without costs.

1841.
REGINA
v.
SNEYD
and Another.

Rule discharged without costs.

The QUEEN v. HAWDON.

(*Before the four Judges.*)

A RULE had been obtained, calling on the prosecutor to shew cause why a side bar rule obtained by him, calling on the defendant to pay the costs of removing this case from the Central Criminal Court into this Court, should not be discharged. The prosecutor had, in October 1838, preferred an indictment against the defendant for libel, and the defendant had afterwards removed it into this Court by certiorari. The case was tried, and the defendant convicted, and sentenced to nine months' imprisonment. The side bar rule for the defendant to pay the costs, occasioned by the removal, was then obtained, but was met by the present rule, as the defendant contended that the removal was entirely regulated by the 4 & 5 Wm. 4, c. 36, s. 16, and, therefore, that no costs were payable.

The Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, s. 16, does not affect the removal of indictments from that Court into the Queen's Bench. Such removal is entirely regulated by the 5 & 6 Wm. 4, c. 33, (the certiorari act,) and a defendant removing such indictment is under the latter statute becomes liable in case of conviction to pay to the prosecutor the costs occasioned by such removal.

Humfrey shewed cause. The application proceeded on the assumption, that the statute regulating the removal of indictments from the Central Criminal Court, was that which constituted the Court, and established its present jurisdiction. But that was altogether a mistake. That act did not, in the least degree, affect the removal of this indictment, which was removed under the 5 & 6 Wm. 4, c. 33, s. 2, and could

1841.
The QUEEN
v.
HAWDON.

not have been removed under any other statute. The 5 & 6 Wm. 4, adopted the provisions of the 5 Wm. & Mary, c. 33, and enlarged the powers thereby given the Judges; and, by those provisions, the defendant removing the indictment, became liable, if convicted, to pay the costs occasioned by the removal.

The defendant in person, in support of the rule. This indictment was brought under the Central Criminal Court Act. Everything relating to the proceeding of that Court, was regulated exclusively by that statute. The removal of this indictment was so, and that act contained no provisions as to the costs of such a removal. The order on the defendant to pay costs was one which could not be maintained.

LORD DENMAN, C. J.—The powers of the Court to grant a certiorari, are now defined by the 5 & 6 Wm. 4, c. 33. That statute passed after the Central Criminal Court Act, and is not restricted by the provisions of that act. The Judges have now a power which they did not possess under the statute of William and Mary, to require such recognizances as they may deem fit, instead of being restricted as before to require recognizances in 20*l*. only; but, in other respects, the statute of William and Mary is incorporated in the recent statute.

PATTESON, J.—The 4 & 5 Wm. 4, c. 36, s. 16, has nothing to do with the removal of an indictment by certiorari into this Court; it only relates to the removal of indictments from the quarter sessions into the Central Criminal Court. The removal here was obtained under the 5 & 6 Wm. 4, which embodies the provisions of the present statute.

Rule discharged.

1841.

GOODTITLE d. MURRELL v. BADTITLE.

KEATING shewed cause against a rule obtained by *Hoggins* for setting aside the writ of habere facias possessionem, issued and executed in the present case, for irregularity, with costs; and why the applicant Peachy should not be restored to possession. The affidavits on which the present rule was obtained, shewed, that in the year 1830, the lessor of the plaintiff had commenced an action of ejectment, and served the declaration on a person named Peachy, who was the tenant in possession. He did not appear, and judgment was accordingly signed against the casual ejector. From that time until December, 1840, no proceedings were taken on the judgment; but, in that month and year, a writ of habere facias possessionem was issued and executed without suing out a writ of scire facias to revive the judgment. On the 8th of May, which was the last day of Easter Term, an application was made to the Court for the present rule, on the ground that no writ of scire facias had been issued to revive the judgment. *Keating* submitted, that the omission on which the present application was founded, only amounted to an irregularity, of which the party complaining must promptly take advantage. A variety of cases to that effect might be cited. The delay from the month of December to the 8th of May, was such laches as disentitled the party applying, to succeed in his application. But supposing the application could be made by any one, it could not be made by Peachy, as he was not before the Court, he not having appeared. It was laid down in *Bac. Ab. tit. (A.) p. 61*, that a writ of error cannot be brought in the name of the casual ejector, as the tenant is not in Court to sue it. The cases cited for this proposition were *Roe v. Doe d. Humphreys (a)*, and *George d. Bradley v. Wisdom (b)*. If, however, he was entitled to

Where after ten years had elapsed from signing judgment in ejectment, execution was issued without reviving the judgment by scire facias, the Court held the want of a scire facias to be such a substantial defect as that delay from the 30th of December to the 8th of May following, in applying to set aside the execution was not such laches as to deprive the tenant of his right to succeed in the application. Such an application may be made by the tenant in possession who has been served with the declaration, but has not appeared, judgment having been signed against the casual ejector; but costs cannot be awarded against the lessor of the plaintiff, without consent.

(a) Barnes, 181.

(b) 2 Bur. 756.

1841.
 {
 GOODYTILE
 dem.
 MURRELL
 v.
 BADTITLE.

make this application, he must still make it within a reasonable time. If the defect was to be regarded as a mere irregularity, then it was quite clear that the application was made too late. It had, however, been decided in one case, that the omission did not merely amount to an irregularity, but to a nullity. That case was *Mortimer v. Piggott* (a). The Court was there reported to have said, that where a defendant had been charged in execution on a writ issued more than a year after judgment had been signed, without reviving that judgment by writ of scire facias, the proceeding was a nullity; and the defendant, therefore, by lapse of time, was not deprived of his right to apply for his discharge. That decision, however, had been questioned in *Arch. Prac.* p.819, note (l). Should the Court, however, be disposed to make the rule absolute, the judgment would not be set aside with costs, *Doe d. Vernon v. Roe* (b). It might be supposed that that case was an authority to shew that the present application might be made by the tenant; but it was to be observed, that the tenant had made himself party to the proceeding, by demanding a particular of the premises sought to be recovered.

WIGHTMAN, J.—Where a judgment is improperly signed against the casual ejector, if the tenant cannot apply to set aside that judgment, what is he to do?

Keating admitted, that in such a case, the Court might permit an application to be made by him. That was not, however, a similar case to the one before the Court.

WIGHTMAN, J.—As no scire facias has been issued after the lapse of ten years from signing judgment, that is an error in materialibus, and, therefore, this application is not too late. The case of *Doe d. Vernon v. Roe* is very much in point in the present case; here the application is to set aside

(a) *Ante*, vol. 2, p. 615.

(b) 2 Nev. & P. 237; S. C. 7 Ad. & E. 14.

the execution, the judgment itself being regular. Now, on the first point, whether the tenant in possession, who has not appeared, has any locus standi in Court to make this application, that case of *Doe d. Vernon v. Roe* decided, that such a person may, under circumstances very similar to the present, apply to the Court to set aside the judgment. That case seems to me an authority against the lessor of the plaintiff on the principal points; but in his favour as to the costs of the motion. I think that the lessor of the plaintiff has been irregular in materialibus; the omission to sue out a scire facias after a lapse of ten years, would be a cause of error that was apparent on the face of the record.

1841.
 GOODTITLE
 dem.
 MURRELL
 v.
 BADTITLE.

Hoggins contra, submitted that the Court ought to make the rule absolute, with costs.

WIGHTMAN, J.—There having been no consent rule, there is no person against whom the Court can award the costs. The case of *Goodright d. Ward v. Badtitle* (a), cited in *Doe d. Vernon v. Roe*, is precisely like this case. The only person who can be ordered to pay the costs is Goodtitle.

The rule was made absolute, with costs, against the lessor of the plaintiff, he consenting to pay them within a week, on condition of the defendant undertaking not to bring any action in respect of the irregular execution (b).

Rule accordingly.

(a) 2 Wm. Black. 763.

(b) See *Adlam v. Noble*, *Ante*, vol. 9, p. 322.

DOE d. WILLIAMS v. SMITH.

GRAY, shewed cause against a rule nisi for judgment as in case of a nonsuit obtained by *Dickenson*. It was an
 Judgment as in case of a nonsuit, may be obtained in an ejectment, if issue has been joined, although through the default of the lessor of the plaintiff, no consent rule has been actually drawn up, the tenant in possession having appeared and pleaded.

1841.
 Doe dem.
 WILLIAMS
 v.
 SMITH.

action of ejectment, and the attorney for the tenant in possession had signed the consent rule; the attorney for the lessor of the plaintiff however, did not sign it, or draw it up. An application and plea were entered, and pleaded by the tenant, and the lessor of the plaintiff added the similiter. The rule for judgment as in case of a nonsuit, it was submitted, was improperly obtained, on the ground that the defendant was not properly before the Court, the consent rule not having been drawn up. The rule ought, therefore, to be discharged, without the lessor of the plaintiff being compelled to give a peremptory undertaking.

Dickenson, in support of the rule, was stopped by the Court.

WIGHTMAN, J.—The tenant in possession having appeared, and the plaintiff having replied, I think enough has been done to entitle the defendant to move for judgment as in case of a nonsuit. The plaintiff must, therefore, give a peremptory undertaking, and then the present rule may be discharged.

Rule discharged accordingly.

DOE d. BAILEY and Another v. BENNETT and Wife.

Where a rule was obtained for staying proceedings in ejectment until the costs of former actions of ejectment, and for mesne profits were paid on the ground of the same title being again in dispute, the rule will be discharged if the lessor of the plaintiff swears generally that his claim is not founded on the same title as was previously litigated, although he does not state under what title he does claim.

BERE shewed cause against a rule obtained by *Prideaux*, which called upon the lessor of the plaintiff to shew cause why the proceedings in the present action should not be stayed, until the costs of two former actions of ejectment, and of an action of trespass for mesne profits should be paid. It appeared, by the affidavits, that a Mrs. Ayres was in possession of certain property, from the year 1815 inclusive. A person named Bennett brought an action of ejectment for the recovery of that property, in the year 1840. No

rule was obtained for staying proceedings in ejectment until the costs of former actions of ejectment, and for mesne profits were paid on the ground of the same title being again in dispute, the rule will be discharged if the lessor of the plaintiff swears generally that his claim is not founded on the same title as was previously litigated, although he does not state under what title he does claim.

1841.

Doe dem.
 BAILEY
 and Another
 v.
 BENNETT
 and Wife.

one appeared in that action, and judgment was accordingly obtained against the casual ejector. An unsuccessful application was made, on the part of Mrs. Ayres, for the purpose of setting aside the judgment so obtained, it being suggested that the declaration in ejectment had not been properly served. An action of trespass, for the mesne profits, was brought by Bennett against Mrs. Ayres, and an action of ejectment was also brought by Mrs. Ayres against Bennett. Before trial in either of those causes, Mrs. Ayres died. Some time after her decease, an action of ejectment was brought, at the instance of the present lessors of the plaintiff, for the recovery, from Bennett, of the same property as he had recovered from Mrs. Ayres. Bennett then obtained the present rule, on an affidavit that the lessors of the plaintiff claimed the property as devisees under a will made by Mrs. Ayres. In answer to the affidavits, it was now sworn, on the part of the lessors of the plaintiff, that they did not claim the property in question under the will of Mrs. Ayres, or in any way through Mrs. Ayres, but that the title, by the strength of which they proposed to recover the property, was perfectly different. The affidavits did not proceed to state what the title was, by virtue of which they did seek to recover. *Bere* submitted that on this affidavit, produced by the lessors of the plaintiff, the present rule must be discharged. The ground on which such an application could succeed was, that the same title was proposed to be brought into litigation. If such an intention did not exist, there was no pretence for compelling the lessors of the plaintiff to pay the costs in question. In order to shew that the same title was not to be brought into dispute, it was sufficient that the lessors of the plaintiff should swear that the title of Mrs. Ayres was not that on which they relied, but a different one, without proceeding to state what the title was, on which they sought to recover the property in question.

Prideaux, in support of the rule, submitted that it did

1841.

Doe dem.
BAILEY
and Another
v.
BENNETT
and Wife.

not sufficiently appear, from the mode in which the affidavit in answer was sworn, that the lessors of the plaintiff were not about to bring into litigation the same title as that which was discussed in the actions wherein Mrs. Ayres was a party. It was not enough for them to swear that the title which they proposed to set up in the present action was not the same as that of Mrs. Ayres, without stating what the title on which they relied really was. They were bound to shew to the Court, on the face of their affidavits, sufficient to make it appear that the same title was not again to be brought into dispute. This not having been done, the present rule ought to be made absolute.

COLERIDGE, J.—The question is, whether it is sufficiently shewn that the lessors of the plaintiff are relying on the same title that Mrs. Ayres did? On the one hand, it is sworn, that they claim under a will of a certain date; and it is fair to suppose that that will must have been seen on the part of the defendants. In answer, it is sworn, that the lessors of the plaintiff do not claim under that will, nor under any other will of Mrs. Ayres. It is sworn, on the part of the defendants, that the lessors of the plaintiff claim under the same title as Mrs. Ayres. Now, as no title has, as yet, been stated at all, it would be a matter of supposition what her title was; however, the answer given is, that the lessors of the plaintiff do not claim under the same title, but under a different one. That may be true, or it may be false; but I think that the lessors of the plaintiff are not bound to disclose their particular title on this rule. As it is not, therefore, satisfactorily shewn that the lessors of the plaintiff are claiming under the same title as Mrs. Ayres, this rule must be discharged, but, under the circumstances, without costs.

Rule discharged without costs.

1841.

DURRANT v. BLURTON and CALEY.

BYLES shewed cause against a rule nisi, obtained by *Gale*, calling on the plaintiff to shew cause why a warrant of attorney, given by the defendant to the plaintiff, and the judgment and execution thereon should not be set aside with costs, on the ground that it had not been properly attested pursuant to the provisions of the 1 & 2 Vict. c. 110, s. 9. It appeared, from the affidavit, that the defendants were resident in London, and in the spring of 1840, they became indebted to an attorney named Martin, who resided in Westminster. The amount of their debt to him was near 3000*l*. About the same time, a writ of fieri facias at the suit of the Metropolitan Bank was issued against their goods, and under it, they were seized. When in this situation, they applied to their attorney, Martin, for his assistance in raising money. He informed them that he had a client, named Durrant, a solicitor, residing in Norwich, who was willing to make the advance required. With him the defendants were unacquainted, but by the intervention of Martin, it was ultimately agreed that Durrant, the present plaintiff should advance the sum of 4900*l*., he receiving as the security for this advance, certain leasehold property, and a warrant of attorney. Martin prepared these instruments, and sent the drafts to the plaintiff, to be settled by him. No abstract of title was, however, submitted to him, that being left entirely to Martin. All the expenses of preparing the instruments were borne by the defendants, and no charge was made to the plaintiff. When the warrant of attorney was executed, a person named Crowther, who was himself an admitted attorney, but who was acting as Martin's clerk, attested the warrant on behalf of the defendants. The reason of his so acting was, as he swore, because Martin was otherwise engaged. A few days afterwards, judgment was signed on the warrant of attorney by Martin on behalf of Durrant. It did not

Where it appeared that an attorney was acting both for plaintiff and defendant in a transaction in the course of which a warrant of attorney was given, and that instrument was attested by a clerk of the attorney, he being also an admitted attorney, it was held, that the attestation was insufficient within the 1 & 2 Vict. c. 110, s. 9.

1841.
DURRANT
v.
BLURTON
and
CALEY.

appear that Martin was the general London agent of Durrant, and different attorneys sued out execution. The question was on this state of facts, which were not disputed between the parties, whether the warrant of attorney was sufficiently witnessed, according to the provisions of the statute. *Byles* submitted that the facts disclosed by the affidavits, shewed that a sufficient attestation had taken place. The objection was, that Martin had acted for both parties, and therefore, that according to the case of *Hutson v. Hutson*, (a) the attestation was not good. The statement of facts did not shew that Martin was acting for both parties. All that he appeared to have done was to sign judgment on behalf of Martin. That was a mere formal act, which could not place him in the situation of attorney to Durrant. The execution, it appeared, was sued out by another attorney. He was, therefore, not disqualified from acting on the part of the defendant. It was, therefore, competent for him to witness the execution of the warrant of attorney. If it was, à fortiori was it competent for his clerk Crowther to witness it. The case of *Paul v. Cleaver*, (b) was to be relied on. There it was decided, that the attestation by an attorney's clerk, is not sufficient to render valid such an instrument. That case, however, would not affect the present, because Crowther was an admitted attorney himself. No grounds, therefore, existed for making the present rule absolute.

Gale, in support of the rule, contended that the affidavits clearly shewed that the attorney Martin acted as attorney, both for the plaintiff, and for the defendant. No other person appeared in the transaction to be acting as attorney, except him; therefore, as the business had been transacted on both sides, it must have been by him. Crowther, it appeared, was merely his clerk, and, therefore, although he might be an admitted attorney in this transaction, he could

(a) 7 T. R. 7. See *Todd v. Gompertz*, ante, vol. 2, p. 296.

(b) 2 Taunt. 360.

not be regarded as the independent attorney of the defendants. If not, then it was perfectly clear, according to the cases of *Hutson v. Huton*; *Paul v. Cleaver*; *Rice v. Linsted* (a), and *Rising v. Dolphin* (b), that the warrant of attorney was not properly witnessed within the meaning of the statute.

1841.

DURRANT
v.
BLURTON
and
CALEY.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for setting aside a warrant of attorney, with the judgment and execution issued thereon, on the ground that the requisites of the 1 & 2 Vict. c. 110, s. 9, were not complied with in the attestation. The undisputed facts of the case are these; that the defendants resident in London, owed one Martin, an attorney in Westminster, in the spring of 1840, nearly 3000*l*. Their goods were about the same time seized under an execution at the suit of the Metropolitan Bank. In this state of things they were desirous to raise money, and Martin, who was their attorney, informed them that he had a client who would advance it. The plaintiff is a solicitor of Norwich, a stranger, as it should seem, to the defendants; and through the intervention of Martin, he agreed to advance 4900*l*. on leasehold security, and a warrant of attorney: both these instruments were prepared by Martin, the drafts having been sent by him, as he swears, to the plaintiff to be settled, but no abstract of title to the leasehold premises, was ever submitted to the plaintiff. In this, he entirely trusted to Martin. The instruments were prepared at the expense of defendant, and no charge made against the plaintiff by Martin. Martin signed the judgment for the plaintiff, a day or two after the execution of the warrant. He was not the general London agent for the plaintiff, and the execution was sued out by the attorneys for him. In this transaction the defendants swear they believe Martin acted as the attorney of the plaintiff. Martin swears positively that he acted only

(a) *Ante*, vol. 7, p. 153.(b) *Ante*, vol. 8, p. 309.

1841.
DURBANT
v.
BLURTON
and
CALEY.

as the attorney for the defendants ; but, on a transaction like this, whether a party acts as agent for the one or the other is a conclusion from other premises, rather than a single isolated fact ; it becomes, therefore, a matter of opinion, and a Court will not feel itself bound by the strongest assertion, however honestly it may believe it to have been made. In my opinion, Martin is shewn by indisputable evidence to have acted as the attorney and agent for both the plaintiff and the defendants ; he represents plaintiff as his client in the first instance, and the plaintiff entirely trusts to him in the most important parts of the whole transaction. I am, therefore, of opinion that he could not have attested the execution for the defendants ; the whole intention of the statute would be defeated, if a person so connected with the plaintiff could act as the attorney for the defendants on that occasion. If any authority were necessary for this, the case of *Rising v. Dolphin*, (a) appears to me to be abundantly sufficient. I have been thus minute as to the situation in which Martin stood, because that seems to me, under the circumstances I am about to state, to decide the case. At the time this transaction was going on, an attorney of the name of Crowther was engaged with him, and serving him as his clerk, and he it was, who in fact attested the execution. I by no means say that he was not competent to do many acts as attorney, because he was a clerk ; but, being clerk and servant to an attorney and master, who was acting in the transaction as attorney for the plaintiff, I think he was affected by his master's disability ; the fact that he was an attorney himself, enabled him in this instance to represent and act for his master, and I think he did so. I observe, that he, in effect states that he attended because Martin was prevented by other engagements from doing so, and he does not state that he charged the defendants any thing for so acting, or received any remuneration from any

(a) *Ante*, vol. 8, p. 309.

one on their behalf. Looking at the substance therefore, of the transaction, which, to effectuate the purposes of the act must be done; but not meaning to impute any fraud in the particular instance before me, I think this warrant was not properly attested, and that the rule must be made absolute, no action to be brought against the plaintiff or the sheriff.

1841.

DURRANT

v.

BLURTON

and

CALEY.

Rule absolute.

See Maybury v. Muddi. 5. D. L. 360.

WHEATLEY v. GOLNEY.

SIMONS, moved for a rule, to shew cause why the plea in abatement in this case should not be set aside, and judgment signed as for want of a plea. The affidavit in support of the application stated, that this was an action of assumpsit, and the defendant pleaded in abatement the non-joinder of a person named Watson as a defendant. An affidavit, verifying the plea, was made pursuant to the 3 & 4 Wm. 4, c. 42, s. 8. It stated the supposed residence of Watson. Inquiries were accordingly made there, and it was discovered that the house was shut up, and it was then ascertained, that, although Watson had resided there, he had ceased to do so for two months. Although other inquiries had been made, it could not be discovered where Watson was then living. It was submitted, that such an affidavit was not what was contemplated by the 3 & 4 Wm. 4, c. 42, s. 8. The words of that section were, "that no plea in abatement for the non-joinder of any person as a co-defendant, shall be allowed in any Court of Common Law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty, in an affidavit verifying such plea." The object of that provision must be, that when the plaintiff commenced a new action, he might be able to serve the defendant mentioned in the plea with process. If, however,

Semble, that under the 3 & 4 Wm. 4, c. 42, s. 8, the affidavit verifying a plea in abatement for the non-joinder of a party as co-defendant, must state his actual residence at the time of making the affidavit.

1841.
 WHEATLEY
 v.
 GOLNEY.

the true residence of that co-defendant was not given, it would be impossible for the plaintiff so to do. It was no answer that the defendant now actually sued, had given the best statement he could of the residence of his suggested co-contractor. As it was not such a description as the statute clearly contemplated, the provision was not satisfied.

WIGHTMAN, J.—I think you may take a rule nisi.

Rule nisi granted.

Theobald subsequently appeared to shew cause against this rule, and admitted that he could not resist the objection, and that, in consequence, the parties had made an arrangement with respect to the action.

Rule absolute accordingly.

In the matter of HOLIDAY.

Where one of two partners attorneys in the country, directed that a particular rule of Court should be served on the London agent of the firm; it was held, that such service was not sufficient to bring the other partner into contempt, in case of disobedience to the rule, though it was sufficient as to the one who wrote the letter.

HUGH HILL applied for a rule, to shew cause why an attachment should not issue against two country attorneys, partners, for not obeying a rule of Court, which required them, among other things, to pay a sum of money. They were resident at Carmarthen; and it appeared, that by the direction and consent of one of them expressed in a letter, the rule had been served on the London agent of the firm. The rule was accordingly served on the London agent, and he made an indorsement on the rule that he accepted the service, as the agent of the attorneys by their direction. Cases had decided that a strictly personal service was not necessary in all cases to bring a party into contempt (a). This, it was submitted, was one of those cases. By the express consent and direction of the attorneys in the country, the

(a) It was so decided in *Green v. Prosser*, ante, vol. 2, p. 99, and *Allier v. Newton*, ib. p. 582. Those cases were, however, overruled by the full Court of Exchequer, in *Stunell v. Tower*, ib. p. 673.

rule had been served on the London agent. Disobedience to that rule amounted clearly to a contempt, for which they were answerable.

1841.

In the matter of
HOLIDAY.

WIGHTMAN, J.—Perhaps the service which is sworn to might be sufficient to bring the partner who gave the consent to the service on the agent into contempt. That, however, cannot affect his partner. It is not sufficient for an attachment, as the ordinary method of transacting business by one partner, will not bring another partner into contempt, unless he himself does some act shewing that he is in contempt. I do not say that the service on the town agent, may not be sufficient for the purpose, if it has been authorized. Consequently, with respect to the partner who wrote the letter, directing the service to be effected on the London agent, a rule nisi for an attachment may be granted; but not as to the other.

Rule nisi accordingly.

— *See Bedford v. Scott & Leck: 457.*

REGINA v. The INHABITANTS OF BARTON.

(*Before the four Judges.*)

THIS was an indictment against the defendants for the non-repair of a road. The case was tried at the summer assizes for Bedfordshire, in 1838. A verdict was then taken for the defendant, but leave was reserved to move to enter a verdict for the Crown. A rule was accordingly obtained for that purpose in the ensuing Michaelmas Term. At that time, the Judge's notes were before the Court. The rule was argued and made absolute; and the verdict was entered as a general verdict for the crown on all the counts of the indictment. A rule was afterwards obtained by the defendant, for the purpose of confining the verdict for the crown to the two first counts of the indictment. The notes of the learned Judge who tried the cause, were not then

If a party, through his own neglect, makes an application to the Court on insufficient materials, and his rule is on that ground discharged, he cannot afterwards be allowed to supply the deficiency, and to renew his application.

1841.
 REGINA
 v.
 The Inhabi-
 tants of
 BARTON.

brought before the Court on the affidavit on which this second rule was obtained, and, on that ground, the rule was discharged. The defendant then obtained the present rule for the same purpose of confining the verdict to the two first counts of the indictment, and this rule was properly drawn up as granted on reading the Judge's notes.

Gunning now shewed cause against this third rule. It must be discharged, for the party has already had the judgment of the Court upon it, and if he does not come prepared in a proper manner on one occasion, he cannot be permitted again to ask the judgment of the Court on the same matter, if the proper materials to support the application were in existence at the time when he first applied to the Court, *Regina v. The Manchester and Leeds Railway (a)*. They were so here, and the defendants cannot now be permitted to supply the defects of their former application.

The Court called on

Byles to support his rule. The Judge's notes would have been brought before the Court in the first instance, but that the Court declared, that the application for them must be the subject of a distinct application. This alone occasioned the irregularity now relied on by the other side, and it ought not to be allowed to prejudice the defendant.

PER CURIAM.—The rule is express that a party who has a full opportunity of bringing his case before the Court must do so in the first instance. If he neglects the means of doing so, he cannot be allowed to come again, and put the other party to the trouble and expense of a second attendance. The rule must be discharged.

Rule discharged.

(a) 1 Per. & Dav. 164; 8 Adol. & Ell. 413.

1841.

DOE d. CUTTELL v. ROE.

LUSH applied for a rule for judgment against the casual ejector. It appeared, by the affidavits supporting the application, that the tenant in possession was a Spaniard, named Pico, and did not understand the English language. The deponent, who had served the declaration, stated that he had gone to the premises, and seen Pico; finding that he was unacquainted with English, he explained the meaning of the declaration and notice to Pico, through the medium of his female servant, who acted as interpreter. Pico, however, refused to receive the declaration, and the deponent accordingly left it on a chair, where the tenant was, after the latter had referred the deponent to an attorney. *Lush* submitted that this was a sufficient service for a rule absolute for judgment against the casual ejector.

If a tenant in possession is a foreigner, not understanding English, the object of the declaration and notice in ejectment may be explained through the medium of an interpreter.

WIGHTMAN, J.—I think it is sufficient.

Rule absolute (a).

(a) Doe d. *Probert v. Roe*, ante, vol. 3, p. 335.

EDWARDS, Administratrix of EDWARDS, v. HOLIDAY and Others.

KNOWLES applied for leave to enter up judgment on a warrant of attorney under ten years' old, it having been given in the year 1835. According to the rule of Court, 1 Reg.

A warrant of attorney to secure advances of money made by a Banking Company to a

particular firm, was executed to the manager of the Company, appointed under the 7 Geo. 4, c. 46, s. 9, authorized him, "his executors or administrators," to enter up judgment. His administratrix, who was his widow, took out a prerogative administration in the province of Canterbury, the parties who had given the warrant of attorney residing within the province of York, at the time of her husband's death: *Held*, that as the judgment was to be entered up in the province of Canterbury, the prerogative administration in that province was sufficient to authorize her to enter it up.

The warrant of attorney was less than ten years old, and, therefore, a rule for judgment would, pursuant to 1 Reg. Gen., H. T., 2 Wm. 4, s. 73, be absolute in the first instance, but the Court would only allow a rule nisi under the particular circumstances of the case.

1841.
EDWARDS
v.
HOLIDAY
and Others.

Gen., H. T., 2 Wm. 4, s. 73 (a), the warrant of attorney not being ten years old, the rule for judgment would be absolute in the first instance. There were, however, some peculiar circumstances in the case, which ought to be mentioned to the Court, before the rule was taken in the ordinary way. It was a warrant of attorney, which had been given in the year 1835, by twenty-two persons, who traded under the firm of Holiday and Co. That firm, it appeared, had required advances from the Yorkshire District Banking Company. Those advances having been made, the warrant of attorney in question was given by the then existing members of the firm, to a person named Edwards, who was the manager of the Banking Company, and it expressly authorized him, "his executors or administrators," to enter up judgment thereon, in case of any breach of the defeasance. In the latter part of the year 1835, Edwards died. As the warrant of attorney had been given to secure advances made in the lifetime of Edwards, as well as future advances, the company still continued to advance money. The amount now due from the firm to the company was more than 1,000*l*. The object of the present application was to enter up judgment on the warrant of attorney, at the instance of the administratrix of Edwards, that person being his widow.

COLERIDGE, J., thought that, under the circumstances, the rule must be only nisi in the first instance.

Rule nisi granted.

Addison shewed cause against this rule. He contended that the plaintiff in the present case had not clothed herself with sufficient authority to take the present proceeding. It appeared, from the affidavits, that she had only taken out

(a) *Ante*, vol. 1, p. 192.

a prerogative administration in the province of Canterbury. The debtor, against whom the present proceeding was taken, was resident in the province of York. According to the authorities, that being a simple contract debt, was bona notabilia in the province wherein the debtor resided at the time of the creditor's death (a). It appeared also, that at the time of the death, the debtor was resident at Leeds, in Yorkshire. A prerogative probate, therefore, of the province of Canterbury could not clothe the administratrix with sufficient authority in respect of bona notabilia in another province. The only authority which could be produced in favour of the present application was that of *Coles, Ex. v. Haden* (b). There, a motion was made for leave to enter up judgment, at the suit of Coles, an executor, on a warrant of attorney, the words of which extended to enter judgment at the suit of Coles, the testator, his heirs, executors, or administrators. The Court granted a rule to shew cause, which was afterwards made absolute, on affidavit of service, no cause being shewn. That case did not appear to have been subsequently recognized: and, therefore, having been decided as long ago as Easter Term, 20 Geo. 2, it could hardly be considered as an authority now. A warrant of attorney was a power which must be strictly pursued; and, therefore, in the case of *Henshall, Executrix, v. Matthew* (c), where a warrant of attorney authorized a person to enter up judgment against the defendant, and the defeasance stated that the warrant was given to him, in order to secure payment to him, his heirs, executors, administrators, and assigns, of 200*l*. and interest, the Court of Common Pleas refused to allow judgment to be entered up at the instance of his executrix, as the testator alone was empowered to enter up judgment. Another objection existed, which was, that such a power as that granted by the warrant of attorney could not be considered as surviving to the administratrix of the public officer. The 7 Geo. 4, c. 46, s. 9, authorized co-

1841.

EDWARDS
v.
HOLIDAY
and Others.

(a) 1 Roll. Abr. 909, (H) 4; 1 Will. Ex. 177, 8.

(b) Barnes, 44.

(c) *Ante*, vol. 1, p. 217.

1841.
EDWARDS
v.
HOLIDAY
and Others.

partnerships of bankers to sue and be sued in the name of their public officers; but it did not thence follow that the executors or administrators of such a public officer should have authority to proceed on such an instrument as a warrant of attorney. The provisions of the section referred to, seemed to shew that the exercise of the power must be merely personal. But, at any rate, this being an application to the equitable jurisdiction of the Court, the circumstances of the parties would be regarded. On examining the affidavits, it would be found that a great number of the persons who were parties to the warrant of attorney had long ceased to be interested in the firm which had originally given it. One of the parties to the warrant had seen that all moneys due from the firm, down to the time of his leaving it, had been paid. For these reasons, it was submitted that the Court would not make the present rule absolute; or, if it did, only on equitable terms.

WIGHTMAN, J.—The two principal objections are,—first, that the administratrix of a manager of a Banking Company has no right to call upon the Court to assist her, by entering up judgment on such a warrant of attorney; and, secondly, that the prerogative administration, from the province of Canterbury, is wrong, as it should be from the province of York.

Knowles, in support of the rule, contended, on the first point, that whatever rights the administratrix of a manager of a Banking Company might have with respect to such an instrument as the present in general, it was quite clear, by the express contract contained in the warrant of attorney, that the judgment might be entered up at the instance of the administratrix of that officer. No objection, on that ground, therefore, could be made to the application. Then, supposing that such a person might make the application, the fact of the administration not being the correct one could not avail. As she was acting under some administration, it must be

assumed that it was a correct one. If it was not, it was for the other side to show, affirmatively, those facts on which the objection depended. Now, it did not sufficiently appear, from the affidavits, that Leeds was in the province of York. The Court could not take judicial notice that Leeds was in that province; but if the objection was to be taken, that fact ought expressly to be shewn by affidavit. In 1 *Chitty on Pleading*, page 201, 4th edition, it was laid down, that "though the Courts will notice provinces and dioceses, they will not any particular place within each province or diocese, except that where the Court sits." For that proposition several authorities were cited. Under these circumstances, if even the objection taken was a good one, the facts were not sufficiently brought before the Court to render it sustainable.

1841.
 EDWARDS
 &
 HOLIDAY
 and Others.

WIGHTMAN, J.—I think the affidavits sufficiently shew that Leeds is in the province of York.

Cur. adv. vult.

WIGHTMAN, J.—This was a question as to the power of entering up judgment on a warrant of attorney by the executors of a nominal plaintiff, suing on behalf of a banking company, pursuant to the 7 Geo. 4, c. 46, s. 9. Two objections were raised; one of which appeared to me to require some consideration, which was, whether the administration granted in this case, and which was a prerogative administration in the province of Canterbury, was sufficient to give title to a party applying, who was executor of the person to whom the warrant of attorney was given, and who would be the plaintiff in an action, if any action was commenced, to enter up judgment upon that warrant of attorney. It was contended, that the person against whom the judgment was to take effect was resident in Yorkshire, and, therefore, administration should have been obtained in the province of York. It seems to me, that that

1841.

EDWARDS
v.
HOLIDAY
and Others.

objection would have had great weight, if the executor had sought, under the administration, to recover a simple contract debt against persons residing in the province of York. It might have been an objection, because simple contract debts are bona notabilia in the province wherein the debtor resides; and here, it appears, that he resided in the province of York. But, it appears to me, that the prerogative administration, in the present case, is sufficient to entitle the plaintiff to succeed in his application. The warrant of attorney is merely an authority to do a thing, which is to be done in the province of Canterbury. The judgment is only to be entered up in that province. It would be totally inefficacious, if he could not exercise that authority, under a prerogative administration from Canterbury, because an administration from the province of York would give him no authority to exercise a power which would be only available in the province of Canterbury. The case is, therefore, not within the rule with respect to simple contract debts, for this is a mere power to enter up judgment, and not to recover a debt. There was another point, as to whether the administrators or executors of such a party could enter up such a judgment. If I was required to determine the abstract question, whether such a right as this would survive to the administratrix of a nominal plaintiff, to whom such an authority was given under the Banking Company's Act, that might require some consideration. But, by the express terms of this warrant of attorney, such a power is given to the executors or administrators of the nominal plaintiff. Without, therefore, considering the effect of the case in *Barnes*, or the circumstance of Edwards being merely a nominal plaintiff, suing for the benefit of the banking company, because it has been expressly agreed that the judgment should be entered up at the instance of him, his executors or administrators, I think that judgment may be entered up.

Rule absolute.

1841.

BOWSER, Assignee of the Sheriff of Carmarthenshire,
v. LLOYD.

W. H. WATSON moved, on behalf of the Sheriff of Carmarthenshire, for a rule to shew cause why the plaintiff in this action should not refund a sum of 45*l.*, which, it appeared, had been overpaid to the plaintiff under an execution issued pursuant to a judgment signed in an action on a replevin-bond. In this case, a replevin-bond had been given, and an action commenced upon it. The defendant pleaded non est factum. The plaintiff recovered in that action, and a verdict was found for the whole amount of the penalty of the bond. The amount of the distress was only 125*l.* The plaintiff was, therefore, only entitled to that sum, together with the double costs of suit. An execution was, however, issued for 317*l.* 10*s.*, and the amount realized was 271*l.* The whole of this sum the sheriff paid over to the plaintiff. It was afterwards ascertained that the total to which he was entitled, including the amount of the distress and his costs, was 226*l.* A sum, therefore, of 45*l.* had been overpaid to the plaintiff. After the sum had been so paid, another writ of execution was lodged with the sheriff, at the suit of a person named Timmins. Sufficient property of the defendant could not be found within the bailiwick to answer that execution. The object of the present application was to compel the plaintiff (Bowser) to refund the amount which had been overpaid to him.

Where it appeared that on an execution in an action on a replevin-bond, a greater sum had been indorsed on the writ, and levied, than that to which the plaintiff was entitled, and that amount had been paid over to the plaintiff, the Court would not, at the instance of the sheriff, or a second execution creditor, compel the plaintiff to refund the overplus.

WIGHTMAN, J.—I do not see what the sheriff has to do with this difficulty. By the 11 Geo. 2, c. 19, s. 23, it is provided, after the replevin bond has been taken, that the sheriff “may assign such bond to the avowant, or person making cognizance, by indorsing the same, and attesting it under his

1841.

BOWSER

v.
LLOYD.

hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant, or person making cognizance, may bring an action, and recover thereupon in his own name; and the Court where such action shall be brought may, by a rule of the same Court, give such relief to the parties upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond." That act, therefore, provides that relief is to be given to the persons who are parties to the bond. It seems to me, that the application, if made by any one, should be by the defendant in the action. I think the sheriff cannot support this application.

Rule refused.

Platt, afterwards, at the instance of the execution creditor in the second action, applied for a rule to shew cause why the 45*l.* should not be refunded to his client. As the plaintiff in the first action had received from the sheriff more than he had a right to obtain, this course, on his part, deprived the plaintiff in the second of part of the fruits of his judgment. Unless the Court interfered in the manner proposed, injustice would be done to the latter.

WIGHTMAN, J.—I do not think that I can grant such a rule against the plaintiff in the first action, at the instance of the plaintiff in the second, unless some authority for so doing is cited. No duty arises between these two parties. The motion is founded on a suggestion that the sheriff has handed over to the plaintiff in the first action more than he ought. If so, the sheriff may have been guilty of a breach of duty towards the plaintiff in the second action; for which, perhaps, a rule might be granted against him.

The plaintiff in the first action is, however, only a third person, as between the plaintiff in the second action and the sheriff. Unless, therefore, I am furnished with an authority for granting the rule prayed, I must refuse it.

1841.

BOWSER
v.
LLOYD.

Rule refused.

GARWOOD v. BRADBURN.

FITZJAMES shewed cause against a rule nisi, obtained by *Knowles*, requiring the plaintiff to shew cause why he should not give security for costs, on the ground of his being abroad. It appeared that the plaintiff was in the Indian army as a private. Being thus abroad in a military capacity, and, therefore, not voluntarily absent, the case came within that class of decisions in which the Court had been in the habit of refusing to compel plaintiffs to give security for costs. He cited *O'Lawler v. Macdonald* (a), where it was held, that a British officer serving abroad, even under a foreign power, could not be compelled to give security for costs; *Lord Nugent v. Harcourt* (b), in which the Court refused to compel a commissioner of the Ionian Islands, filling his office out of England, to find security for costs; *Evering v. Chiffenden* (c), where the Court would not compel a plaintiff, who was a lieutenant in the navy, and holding the offices of post captain and harbour master, in the Island of Barbadoes, to give security for costs; and *Henschen v. Garves* (d), where a foreign seaman having brought an action for his wages against a foreigner, the Court refused to compel him to give security for costs, on account of his being on a voyage on board an English ship. On these grounds, it was submitted, that the present rule ought to be discharged.

The Court refused to compel a plaintiff, who was a private in the East India Company's Service in India, to give security for costs, although it was sworn to be the custom of the company, to make their soldiers enlist for life, and not to allow them to return to England, unless discharged.

(a) 8 Taunt. 736; 3 Moo. 77.

(b) *Ante*, vol. 2, p. 578.

(c) *Ante*, vol. 7, p. 536.

(d) 2 H. Blac. 383.

1841.
GARWOOD
v.
BRADBURN.

Knowles, in support of the rule, contended that, under the circumstances of the present case, the Court would be of opinion, that the rule ought to be made absolute. He admitted the authority of all the cases cited on the other side. The facts of the present case, however, were different from any of those to which the decisions cited referred. It appeared, by the affidavit in support of the application, that the plaintiff was a private in the East India Company's service; that on inquiry being made at the India House, the deponent was informed by the military secretary, that it was the custom of the India Company to accept the enlistment of men for life, and not for any limited period: that when they once went to India they never returned, unless they were discharged, either by purchase or otherwise. The present case, therefore, was clearly distinguishable from all those cited on the other side; as in those, there was something to show that the plaintiff would return soon within the jurisdiction; but here, the effect of his engagement was, to keep him out of the jurisdiction for life.

COLERIDGE, J.—That objection might apply to any military person, or to any person whose absense was not voluntary; as in the case of the commissioner of the Ionian Islands, or the naval lieutenant, who was post captain.

Knowles. Still, in all those cases, the parties, although out of the jurisdiction for a time, would, sooner or later, return within it: but that could not be the case in the present instance. Besides, the plaintiff here was not in the service of the Queen, but in that of the East India Company. The analogy, therefore, did not hold between military persons in the Queen's service, and the present plaintiff. Under the peculiar circumstances of this case, it was submitted, that the plaintiff ought to be compelled to find security for costs.

COLERIDGE, J.—I do not think that I ought to extend

the limits within which the Courts have bounded themselves in making parties to give security for costs. As to the practical inconvenience, it is the same, whether a party is abroad for fourteen years, or for life. It is well known, that the Queen's regiments in India go out there for ten, twelve, or fourteen years, according to circumstances. Then it is said, that the Indian army is not the public service of the country. But it would be frittering away the rule if that distinction was allowed to be made, as it is known that that army itself is under the command of a Queen's officer. So far as to the ground of absence. Then it comes to the question, whether the absence is voluntary or involuntary? If a party is involuntarily abroad, it would be a hardship on him if he could not bring his action without giving security for costs. I think, therefore, that the present rule must be discharged.

1841.
GARWOOD
v.
BRADBURN.

Fitzjames applied for the costs of the rule, and cited *Bohrs v. Sessions* (a), and *Evering v. Chiffenden* (b).

COLERIDGE, J.—I think there is no pretence for giving costs. The case is just within the extreme verge of the rule.

Rule discharged without costs.

(a) *Ante*, vol. 2, p. 710.

(b) *Ante*, vol. 7, p. 536.

ROSS v. CLIFTON and Another.

(Before the four Judges.)

WARREN obtained a rule to shew cause why he should not be allowed to add the words "by statute" to the general issue pleaded in this case, for the purpose of giving evidence under it, of certain matters of defence under the Building

The pleading rules of H. T., 4 Wm. 4, do not interfere with the effect, which, previous to them, was

given to the plea of the general issue, when allowed by statute.

1841.
 {
 ROSS
 v.
 CLIFTON
 and Another.

Act, 14 Geo. 3, c. 78. It was an action on the case by a reversioner for an injury to his messuage, &c. The first count of the declaration stated, that, at the time when, &c., a dwelling house, of which the plaintiff was reversioner, was in the possession of one J. T., as tenant to the plaintiff, and complained that the defendants had wrongfully, by bricks and other building materials, obstructed a drain, which the plaintiff had a right to use, running from his house to the common sewer. The second count complained that the defendants, by laying bricks and other building materials on a wall of the house, had prevented the rain from being carried off as of right it ought, from the top of the house into a certain water-course. In addition to the plea of not guilty to the whole declaration, the defendants had pleaded specially to the first count. 1st. A traverse of the tenancy to the plaintiff, and of the plaintiff's reversion. 2nd. The same plea to the second count. 3rd. To the first count a traverse of the right to use the drain as alleged. 4th. To the second count, a traverse of the right for the drain to be carried off as alleged; and 5th. A traverse that the wall was part and parcel of the plaintiff's house.

Shee, Serjt., and *M. Chambers* shewed cause (a). The defendant ought not to be allowed to plead the general issue "by statute," and also his special pleas. The matters of defence contained in his special pleas would be admissible in evidence under not guilty "by statute," for the new rules have not affected such a plea, which is exempted from their operation by the proviso in 3 & 4 Wm. 4, c. 42, s. 1, *Neale v. M'Kensie* (b), *Fisher v. Thames Junction Railway Company* (c), *Haine v. Davey* (d), and *Legge v. Boyd* (e); the last of which cases shewed that the Court, in their discretion, under the statute

(a) Before Lord Denman, C. J.,
Patteson, Williams, and Coleridge, J.'s.

(b) 1 C., M. & R. 61.

(c) *Ante*, vol. 5, p. 773.

(d) 4 A. & E. 892; S. C. 6 N. & M. 356.

(e) *Ante*, vol. 9, p. 39.

of Anne, would not allow these special pleas to stand together, with not guilty "by statute." There might be defences, as in *Wells v. Ody* (a), which would not be evidence under the statutable plea of "not guilty," but no such defence is set up in the present case.

1841.
 Ross
 v.
 CLIFTON
 and Another.

Warren, contra. Special pleas, containing defences admissible under the statutable general issue, are by no means unusual, *Twigg v. Potts* (b), and *Hooker v. Nye* (c). *Tindal, C. J.*, in *Legge v. Boyd* (d), appears to have doubted whether the cases relied upon in opposition to this rule, had been properly decided. The general issue, by statute, is a compound plea, comprehending defences admissible under the general issue at common law, and also the special defences admissible by virtue of the statute only. The proviso in 4 & 5 Wm. 4, c. 42, s. 1, saves only the statutable branch of such a plea, and the common law branch of it is contracted in common, with the general issue in ordinary cases, by the new rules. The common law branch, therefore, of the plea in question, having been so contracted, the whole plea is less compendious than it was, and would not put in issue, as formerly, many allegations, (as of property and other matters,) contained in the declaration. The special pleas in the present case, traverse such allegations in the declaration, as would neither be put in issue by the ordinary plea of not guilty, contracted as it has been by the new rules, nor would be avoided by any of the special matters of defence under the Building Act. They are, therefore, pleas which contain no defences already included in the statutable general issue, and should be allowed; and it may turn out that the defendants will not succeed in bringing this case within the Building Act, in which event the special pleas may be of vital importance to them.

Cur. adv. vult.

(a) 1 M. & W. 452.

(c) 1 C., M. & R. 258.

(b) 1 C., M. & R. 89.

(d) *Ante*, vol. 9, p. 39.

1841.
Ross
v.
CLIFTON
and Another.

The following judgment of the Court, after conference with the judges of the Common Pleas and Exchequer, was delivered at the Sittings in Banc after Easter Term, (May 10th) by

Lord DENMAN, C. J. This was an action on the case, for an injury to the reversionary interest of the plaintiff. The defendant has pleaded not guilty, and three other pleas traversing the material allegations in the introductory part of the declaration. He now seeks to add to the plea of not guilty, the words "by statute" in the margin, with the view of setting up a defence under the Building Act, which has a clause enabling the defendant to do so, under the general issue, and he seeks also to retain his other pleas. The plaintiff opposes this, on the ground that not guilty "by statute" of itself, puts in issue all the allegations in the declaration. An ingenious and very plausible argument was urged for the defendant, founded on a supposed double effect of the general issue, the one at common law, by which it puts in issue all the allegations of the declaration, the other by statute, which enabled the defendant to give his special defence in evidence under it, and it was contended that the proviso in 3 & 4 Wm. 4, c. 42, s. 1, preserved only the latter effect, and that the new rules had destroyed the former. The contrary was held by the Court of Exchequer, in the case of *Fisher v. Thames Junction Railway Company* (a), which was an action by a reversioner, and is directly in point. The same language was held by that Court in other cases. In conformity with that decision, we think ourselves bound to hold that the plea of the general issue, wherever the provisions of any act of parliament apply to it, is wholly unaffected by the new rules, and must have the same operation as it had before they were made. This rule may be made absolute for the insertion of the words "by statute," in the margin

(a) *Ante*, vol. 5, p. 773.

of the plea, upon payment of costs, and striking out all the pleas excepting that of not guilty.

1841.

Ross

v.

CLIFTON
and Another.

Rule absolute, on the Defendant electing to strike out his special pleas.

Warren, in the Trinity Term following, having declined to avail himself of the rule on the above terms, obtained a rule nisi for adding to the pleas, as they originally stood, three special pleas, containing his defences under the Building Act, which rule, after cause shewn by *Shee*, Serjt., and *M. Chambers*, was made absolute in the same term (a).

(a) In *Bartholomew v. Carter*, to require the words “by statute, p. 896, the Court of C. P., tute” to be annexed to the statute decided that they had authority tutable general issue.

FOWLE v. STEINKELLER.

PETERSDORFF shewed cause against a rule nisi, obtained by *Theobald*, requiring the defendant to shew cause why a sum of 666*l.* 2*s.* 10*d.*, part of the larger sum of 1,000*l.*, deposited in lieu of bail, pursuant to the 43 Geo. 3, c. 46, and paid into Court, pursuant to 7 & 8 Geo. 4, c. 71, should not be paid over to the plaintiff. It appeared, from the affidavits, that the defendant, having been arrested for 1,000*l.*, the cause, and all matters in difference, were referred to arbitration. The arbitrator awarded that a sum of 666*l.* 2*s.* 10*d.* was due to the plaintiff in respect of the action, and a sum of 1,079*l.* in respect of the matters in difference. The present application was made to take out of Court the sum as awarded in respect of the action. It was admitted, that so far as that amount was concerned, the present rule must be made absolute; but it was submitted, that with respect to the residue of the 1,000*l.*, the defendant

Where a sum had been paid into Court, to abide the event of the suit pursuant to the 43 Geo. 3, c. 46, and the 7 & 8 Geo. 4, c. 71, and the cause and all matters in difference, being referred, and a sum was awarded in favour of the plaintiff in the action, and as to the matters in difference, the Court made absolute a rule obtained by the plaintiff for obtaining payment out of Court of a part of the deposit in respect of the action, but refused, on disposing of that rule to direct the residue to be paid over to the defendant, but left him to make a separate application for that purpose.

1841.
 FOWLE
 v.
 STEINKELLER.

was entitled to have that money out of Court. The deposit had only been made in respect of the action, and, therefore, could not be applicable to the claim in respect of the matters in difference between the parties.

Theobald, in support of the rule, contended that the balance of the 1,000*l.* remaining in Court ought not to be paid over to the defendant, a much larger amount being due to the plaintiff under the award. At any rate, such a direction could not be given by the Court on the present rule, but must be made the subject of a separate application. The plaintiff would then have an opportunity of answering the statements made by the defendant. The rule must, therefore, be made absolute, in the form proposed by the plaintiff.

WIGHTMAN, J.—Strictly speaking, I think the terms proposed by Mr. Petersdorff cannot be engrafted on this rule, if it is objected to. It is admitted that the sum of 666*l.* 2*s.* 10*d.* must be paid over to the plaintiff: but it is objected, that the remainder of the 1,000*l.* should not be paid over to the defendant. The plaintiff ought to have an opportunity of making an affidavit in answer to the cross-application. Therefore, the objection being made, the latter application cannot be engrafted on this rule. The present rule must, therefore, be made absolute in its terms.

Rule absolute.

NUGEE v. SWINFORD.

The Court will not grant a *distringas*, for the purpose of outlawry, where attempts

to serve the summons at the defendant's last place of residence have not been made, although it is unknown, if no attempts have been made to discover it.

T. HILL applied for leave to issue a *distringas*, in order to proceed to outlawry against the defendant. It appeared, from the affidavits on which he moved, that the defendant

was a naval officer; that attempts had been made to find him by making inquiries at his agents, and at his bankers. Those inquiries, had been unsuccessful. No statement was made, however, of any inquiries instituted at the defendant's last place of residence; it did not appear that it was known, or that any attempts had been made to find it.

1841.
 NUGGE
 v.
 SWINFORD.

WIGHTMAN, J.—I think the attempts to serve the defendant, as they appear in this affidavit, are not sufficient. It is not shewn where the defendant lives, or that efforts have been made to serve him there. It seems, however, from the statement in the affidavit, that he is resident in this country, and, therefore, the application should be for a *distringas* to compel an appearance, and not for the purpose of outlawry. Although the defendant's residence may be unknown, yet it should be shown that inquiries have been made in order to ascertain it.

Rule refused (*a*).

(*a*) See *Grindley v. Thorn*, *ante*, vol. 5, pp. 383, 544.

DOE d. OVERTON v. ROE.

CHARLES CLARK applied for leave to sign judgment against the casual ejector. The peculiarity in the case was, that service had been effected on one of four partners, who were tenants in possession of the premises sought to be recovered. It was, however, sworn that this partner was "the acting town partner." This service, it was submitted, was sufficient to entitle the plaintiff to judgment against all the partners.

Service on the acting partner of a firm in possession of premises sought to be recovered, is sufficient.

WIGHTMAN, J.—I think the affidavit discloses a sufficient service as to all the tenants.

Rule absolute.

1841.

DOE d. COZENS v. COZENS.

(Before the four Judges.)

The death of the lessor of the plaintiff in ejectment, taking place after verdict, and pending a rule for a new trial does not furnish a ground for the Court staying the proceedings, or calling on the plaintiff for security for costs, if the interest claimed by him was more than an estate for life.

IN this case a verdict had been given for the defendant, and a rule for a new trial obtained. While the case was in the new trial paper, the lessor of the plaintiff died. In Hilary Term, a summons was taken out, calling on the plaintiff to shew cause why all proceedings should not be stayed, or the defendant receive security for costs. The summons was heard at Chambers, before *Williams, J.*, who refused to make an order. *Thrustout d. Turner v. Grey* (a) was referred to. When the cause was called on in the new trial paper,

Ludlow, Serjt., for the defendant, objected to the case being heard until security was given for costs. The case cited was an authority for the application. There the Court refused to stay the proceedings, observing, "all we can do is to oblige him to give security for costs now the lessor is dead."

Carrington, contra. The circumstances of the two cases were very different. In *Thrustout d. Turner v. Grey*, the lessor of the plaintiff claimed only as tenant for life. His death, therefore, put an end to the claim, and all that could be recovered in the action, was damages and costs. Here, the lessor of the plaintiff claimed in fee, and there was still an interest in the land itself in contest with the defendant.

PER CURIAM.—The existence of an interest in the land itself is an answer to the application.

The case was then argued on the merits.

(a) 2 Stra. 1056.

1841.

REGINA v. ANDERSON.

JERVIS and *Crompton* applied, on the 24th of May, that the rule in this case might be enlarged, on the ground that it had not been served in such time as to enable the party on whom it was so served, to shew cause according to the exigency of the rule. It was a rule to shew cause why an information, in the nature of a quo warranto, should not issue against the defendant, for exercising the office of burgess of the borough of Ludlow. The rule had been obtained on the 8th May, which was the last day of Easter Term, and required cause to be shewn on the 22nd May, which was the first day of Trinity Term. On the 18th, it was served at Ludlow. It was despatched by that night's post to the defendant's attorney, and reached his office on the 19th. The 20th and 21st were holidays, and, therefore, copies of the affidavits could not be procured antecedent to the day for shewing cause. These facts, it was submitted, were sufficient ground for enlarging the time to shew cause. It was, moreover, suggested, that as the necessity for making this application had arisen from the parties' improper delay in serving the rule, the defendant ought not to be required to comply with the usual terms imposed on enlarging rules, of filing the affidavits within a certain time previous to the expiration of the enlarged time.

Where a party improperly delayed in serving a rule, and on that ground, the rule was enlarged, the Court would not compel the party enlarging the rule to comply with the usual condition of filing his affidavits previous to shewing cause.

WIGHTMAN, J.—I think the rule may be enlarged for ten days, and the defendant will not be required to file his affidavits in the ordinary manner previous to shewing cause.

Rule enlarged accordingly.

1841.

MOGGERIDGE v. DREW.

Where a cause has been tried before the under sheriff, and a new trial is directed, it may be made part of the rule for that purpose, that the cause should be tried before the superior Court, and a separate application for that purpose is not necessary.

PETERSDORFF shewed cause against a rule nisi, obtained by *M. D. Hill* for a new trial in this cause, which had been tried before the under sheriff of Middlesex.

COLERIDGE, J., was of opinion that the rule ought to be made absolute for a new trial.

M. D. Hill and *Knowles*, who appeared to support the rule, applied to have it made part of the rule, that the new trial should take place before a Judge of this Court, on the ground that a number of difficult points of law must necessarily be decided on the trial.

Petersdorff contended that such a term must be made the subject of a separate application.

COLERIDGE, J.—On former occasions I have allowed this to be done, and I think that the term may be made part of the rule without a separate application.

Rule absolute accordingly (a).

(a) See *Dadley v. Yates*, ante, vol. 8, p. 487.

THE QUEEN v. the PROPRIETORS of the NOTTINGHAM
JOURNAL and Others.

(Before the four Judges.)

In order to maintain an application for a criminal information, the party applying must leave himself wholly in the hands of the Court, and in no way whatever make libellous attacks on the other side.

IN this case, a rule had been obtained for a criminal information to be filed against the defendants, for the publication of a paragraph alleged to be libellous.

must leave himself wholly in the hands of the Court, and in no way whatever make libellous attacks on the other side.

Balguy, M. D. Hill, and Hayes, in shewing cause, relied, as a preliminary objection, on the fact that the party now seeking the interference of the Court in his favour had, since the publication of the paragraph he complained of, published in certain other papers a libellous attack on these defendants. In a letter written by him, and sent to different public papers, he had declared the attack on him to be “scandalously false.”

1841.
 The QUEEN
 v.
 The Proprietors of The
 NOTTINGHAM
 JOURNAL
 and Others.

Wildman, contra, insisted that the supposed libellous attack was only a strong and indignant denial of the imputations cast on the complainant. The object of the letter wherein these expressions were used was to obtain the names of the writers of the original libel.

LORD DENMAN, C. J. He has done more than was necessary in order to deny the charges made against him. Persons who ask for the interference of this Court in their favour, by the exercise of its summary jurisdiction, must leave themselves wholly in the hands of the Court. If in any way they make attacks on the parties against whom they ask for our summary interference, they disentitle themselves to succeed in their application. There is no restrictive qualification on this rule, which has been again and again laid down in this Court.

PER CURIAM.—Rule discharged.

Balguy prayed that the rule might be discharged, with costs.

PER CURIAM.—It is not the practice of this Court to give costs to a party who discharges a rule on a preliminary objection.

Rule discharged without costs.



1841.

An arbitrator on a reference with respect to the right to a certain house and premises, directed certain conveyances to be executed by one party to the other, and awarded, that in case of any dispute arising with respect to the form of those conveyances, those disputes should be settled by such counsel or solicitor as he should appoint. The Court set aside the award, on the ground that the arbitrator, by reserving a future power to himself to delegate the authority to determine disputes between the parties, was an excess of authority, and, therefore, set aside the award, as this direction could not be separated from the rest of the award.

In the matter of Arbitration between TANDY and TANDY.

V. LEE shewed cause against a rule for setting aside an award, on the grounds, amongst others, of an excess of authority and want of finality, with respect to the mode in which certain possible disputes as to conveyances, &c. should be settled. The submission was between John Tandy the younger, John Tandy the elder, and Charles Tandy. The date of the submission was the 22nd August, 1840. It recited that John Tandy the younger claimed to be heir-at-law to his late brother, William Tandy, and, as such heir, to be entitled to the possession, or to receive the rents and profits for his own use, of the Bell Inn, at Rouse Leuch, in the county of Worcester; and that John Tandy the elder, as mortgagee of the premises, claimed title thereunto, in respect of a sum of 100*l.* and interest, originally charged on them by John Alland, and which John Tandy the elder had paid off; and that Charles Tandy, as administrator of William Tandy, alleged that, should it be found that John Tandy the younger, as such heir-at-law as aforesaid, was legally entitled to the possession of the Bell Inn, he would be deemed in equity either as a trustee for and on behalf of the creditors and the persons entitled to the assets of the deceased, under the statute for the distribution of intestate effects; that a writ had been sued out of the Court of Exchequer, by John Tandy the younger, against John Tandy the elder: and that, after issue joined and notice of trial given at two different times, the record was withdrawn, by reason whereof the said John Tandy the elder had since obtained judgment as in case of a nonsuit, and was entitled to the costs relating to such judgment, to be taxed by the proper officer, which costs, when taxed, were to be considered as an undisputed item, to be brought into account between the parties; and that divers other claims, demands, and differences had arisen, and were pending between the parties; that it

was then agreed to refer all matters in difference to arbitration, and the parties agreed to execute all such conveyances, releases, and assurances as the arbitrator should direct. The costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator having entered on the reference, made his award on the 9th November, 1840. It awarded, "That John Tandy the younger is, as he claims, heir-at-law to his late brother William Tandy; that the said John Tandy the elder is, as he claims, entitled to the sum of 100*l.* and 46*l.* 5*s.* for interest thereon; also, that the said John Tandy the elder, and Charles Tandy, are indebted to the said John Tandy the younger, in the sum of 184*l.* 15*s.* 7*d.*" It then ordered that the sum of 38*l.* 10*s.* 7*d.* should be paid by John Tandy the elder and Charles Tandy to John Tandy the younger, on the 23rd of December, "such sum to be taken and considered in liquidation of all claims and demands either of the parties to the said recited agreement may have upon the other or others of them, either as mortgagee, administrator, or otherwise howsoever." It then directed that John Tandy the elder and Charles Tandy should deliver an abstract of all deeds in their possession relating to the Bell Inn; "and shall, on the said 23rd day of December next, execute all such conveyances, releases, and assurances, as may be necessary for conveying, releasing, or otherwise assuring unto the said John Tandy the younger, his heirs and assigns, or as he shall appoint and direct, all the estate, right, and interest of them, the said John Tandy the elder, and Charles Tandy, or either of them, of and to the said messuage or inn and premises, situate at Rouse Leuch aforesaid, called the Bell Inn, with the appurtenances freed and discharged from the said mortgage debt or sum of 100*l.* and interest, and from all other incumbrances made or committed by the said John Tandy the elder, and Charles Tandy, or either of them. And in case of any dispute as to what conveyances, releases, or assurances shall be necessary for that purpose, or as to

1841.

TANDY
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TANDY.

1841.

TANDY
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TANDY.

any of the clauses, covenants, or provisos to be contained therein, shall arise, the same shall be settled and approved between the said parties by such counsel or solicitor as I shall appoint." It then ordered, "That the costs should be equally borne by each party." And, lastly, "That upon payment of the sum of 38*l.* 10*s.* 7*d.*, and execution of such conveyances, releases, and assurances as aforesaid, the said John Tandy the younger, and John Tandy the elder, and Charles Tandy shall, at the costs of the party requiring the same, sign, seal, and execute mutual agreements and releases to each other of all controversies, actions, suits, accounts, judgments, and demands whatsoever, from the beginning of the world to the day of the date of the said obligation." In the rule to set aside the award, the material objections were, "That the arbitrator, in directing as to the execution of conveyances, releases, and assurances, that in case any disputes as to what conveyances, releases, or assurances shall be necessary, or as to any of the clauses, covenants, or provisos to be contained therein, shall arise, the same shall be settled and approved between the said parties by such counsel or solicitor as he, the said arbitrator, shall appoint; and in ordering all further costs to be incurred in settling any conveyances, releases, or assurances, in case of dispute as aforesaid, to be paid as in the said award is expressed, has exceeded his authority; and that the said award is not final in that respect." *Lee* submitted, that in reading the award, with a view to sustain it, no defects, such as those pointed out in the rule, could be considered as existing. If, however, the Court thought that an excess of jurisdiction had been exercised by the arbitrator, it might be discarded, and the remainder of the award would be good. He cited *Addison v. Gray* (a), *Winter v. Lethbridge* (b), *Doe d. Williams v. Richardson* (c), *Aitcheson v. Cargey* (d).

(a) 2 Wils. 293.

(c) 8 Taunt. 697.

(b) M'Clel. 253; 13 Price, 533.

(d) In Error, 2 Bing, 199; 9 Moore, 381.

1841.

TANDY
and
TANDY.

W. J. Alexander and *White*, in support of the rule, contended that the arbitrator, by not determining completely, when he published his award, what was to be done ultimately by the parties, had left his award defective, for want of finality; and by reserving to himself a power to appoint a counsel or solicitor, if future differences arose between the parties, he was exercising a power which the submission to arbitration had clearly not conferred on him. Having thus made an award which was not final, and exceeded his jurisdiction, the present rule must be made absolute. They cited *Manser v. Heaver* (a), *Thinne v. Rigby* (b), *Ross v. Clifton* (c).

COLERIDGE, J. I think that there is one objection which is fatal to this award. It is certain that, if an arbitrator exceeds his authority, it will make the award bad; but if the matter in which he exceeds his authority can be separated, so as to leave the rest of the award untouched, the remainder of the award may stand good. If, however, the excess of authority overrides the whole of the award, it cannot be sustained. In this case, there has been an excess of authority, which affects the very substance of the award; and, therefore, it cannot be said that he has properly decided the matters referred to him. The arbitrator has made a reservation to himself of a contingent power to appoint a counsel hereafter, to decide as to what shall be the proper conveyances, releases, &c. to be executed between the parties, and as to the clauses and covenants which they are to contain. Now, it is settled, that if an arbitrator does not decide the matter referred to him, at the time he makes his award, but reserves to himself a future power to act when his power is gone, that it is an excess of authority, as he cannot, in that way, keep alive his authority; nor can he, I think, delegate it, as he attempts to do here. In this case, the question in dispute is as to the title

(a) 3 Barn. & Adol. 295.

(c) *Ante*, vol. 9, p. 356.

(b) Cro. Jac. 314.

1841.

TANDY
and
TANDY.

of the Bell Inn: on the one hand, there is a claim of John Tandy the younger, as heir-at-law of his brother: on the other, there is the claim of John Tandy the elder, as assignee of a mortgagee; and again, there is the claim of Charles Tandy, as administrator. Then, the very question in dispute is, whether John Tandy the younger is entitled, as heir-at-law, to have the Bell Inn conveyed to him? I will assume that the arbitrator has properly decided that he is heir-at-law, and that the title to have a conveyance of the Bell Inn has been decided; but then the arbitrator only awards, that on the day when the money is to be paid, John Tandy the elder, and Charles Tandy shall execute all such conveyances, &c. as may be necessary for the conveyance and assurance to John Tandy the younger, of the Bell Inn. But the manner in which the conveyance is to be effected is left in doubt, the arbitrator only saying that he will, at a future time, decide upon a person who shall settle it. Thus the very question in dispute, as to the right to have possession of the Bell Inn, is left undecided; and I think that that is a question which so affects the award that the whole is bad.

Rule absolute.

THE QUEEN v. POLWORTH.

(Before the four Judges.)

If a coroner's jury should find a verdict of manslaughter the value of anything supposed to be moving to the death, may be found, so that it may afterwards be forfeited, if, on an indictment for the manslaughter, a conviction should follow.

IN this case, a rule had been obtained to quash an inquisition taken before the coroner for Essex. The inquisition stated, that on the 13th of February the defendant, with force and arms, at the parish of West Tilbury, upon one James Smith, made an assault, he, the defendant, then being the commander of the steam-vesel called the *Manchester*, of the value of 800*l.*, then navigating in the river

But an express finding of a deodand on an inquisition for manslaughter is bad, deodands being legal only in cases of death by misadventure.

Thames, the said James Smith then being on board the *Tyrian*, another vessel, then also being in the river Thames; and the defendant, by propelling the Manchester against the *Tyrian*, forced Smith into the river, in consequence whereof he was drowned. The coroner's jury returned a verdict of manslaughter against the defendant, and found a deodand of the full alleged amount of the value of the vessel. The case was argued in Hilary Term last, when

1841.
 The QUEEN
 v.
 POLWORTH.

The Attorney-General and *Wightman* argued in support of the inquisition. A deodand may be levied, though blame is imputed to the party causing the death. The instrument occasioning a death was, in ancient times, forfeited to the Crown, in all cases whatever. It was not the less forfeited, because some person, by improperly using it, has rendered himself liable to punishment. The inquisition is sufficient in form; the defendant may be tried on it; and, therefore, it ought not to be quashed.

Sir *W. Follett*, *Ball*, and *Willes*, in support of the rule. The two findings in the inquisition are inconsistent with each other. A deodand is not a penalty or forfeiture, in the criminal sense of the word. It was, in its origin, an offering to the Church for prayers for the repose of the soul of the person killed. Where the death is the result of a felonious act, the person whose act produces the death, not the instrument with which he produces it, is the object of the proceeding of the law, and the forfeiture of his life or his liberty is a penalty for the offence. In such a case, no deodand is payable. That is given only in cases of misadventure. There were other objections to the inquisition, but the judgment proceeded on this alone.

LORD DENMAN, C. J., in the early part of Trinity Term, delivered judgment. There was a motion, in this case, to quash an inquisition, where a coroner's jury had given a ver-

1841.
The QUEEN
v.
POLWORTH.

dict of manslaughter against the defendant, for occasioning the death of a person named James Smith, by the mismanagement of a steam-boat. Several objections were made to the form of the inquisition; and the question, in substance, was, whether a coroner's jury can lay a deodand on a thing causing the death, in any case where the verdict is that of murder or manslaughter? We think that the deodand cannot be laid under such circumstances, and that, for that reason, the present inquisition must be quashed. All the authorities in the Books, where deodands have been imposed, are those in which the death was occasioned by misadventure. Whatever may have been the origin of deodands, there is no reason to countenance the belief that they were imposed in the light of fines on the person by whom the death was brought about. But the principle on which they were established is so much a matter of conjecture, that we do not feel inclined to increase the extent of the cases to which deodands may be deemed applicable, but rather to limit them to cases established by long practice, and recognised by law. In *Coke's Institute* (a), the cases in which deodands can be imposed are thus described:—"Deodands are, when any moveable thing inanimate, or beast animate, do move to, or cause the untimely death of any reasonable creature by mischance, without the will, or fault, or offence of himself, or of any person." The statute 4 Edw. 1, stat. 2, *De Officio Coronatoris*, speaks of deodands as of things to be given in cases in which the finding is not connected with any offence. They are described in the same manner in *Hale's Pleas of the Crown* (b), where it is said, "Upon the death of a man by misadventure, &c. the inquisition ought to inquire of the goods that occasioned the death, and the value of them, and the *Villata* where the mischance happened shall be charged with process for the said goods, or their value. And this is the reason that, in every

(a) 3 Inst. c. 9.

(b) Part 1, c. 32.

indictment of murder, manslaughter, &c. the indictment finding that he was killed with a sword, staff, &c. ought to find the price, because the king is entitled to that instrument whereby the party was killed, or the value thereof; and that although it were the sword of another man, and not his that gave the stroke." Whether the king is so entitled to them must depend, in a case of felonious killing, upon the finding of the verdict on the indictment, and not on the inquest. It may be right that, on a finding of manslaughter by a coroner's jury, that the value of the steam-boat should be found; but it is not right to add to that finding another, to the effect that the steam-boat was moving to the death; for this latter finding is only proper where the death is declared to have happened from misadventure alone. Lord *Hale* treats this as perfectly clear; and, in *Fleta* (a), deodands are treated in the same manner. So they are in *Bacon's Abridgment* (b), where it is said, "that deodands are "of things that procure the death of a man without the default of another;" in *Foster's Crown Law* (c), in *East's Pleas of the Crown* (d), in *Hawkins* (e), and *Staundforde* (f). In *Foxley's* case (g), the same language is used; and it is said that deodands are goods which occasion the death of a man by misadventure, and are not forfeited till the matter is found on record. So that we have no difficulty whatever in declaring that this finding of a deodand, in a case of manslaughter, is bad; and that the inquisition, so far as respects that finding, must be quashed.

1841.
 The QUEEN
 v.
 POLWORTH.

Rule absolute.

(a) Bk. 1, c. 25.

(b) Tit. Deodand.

(c) Tit. Deodond.

(d) p. 836.

(e) 1 Hawk. P. C. 26.

(f) Bk. 1, 20, (A).

(g) 5 Rep. 110.

*In re Lord & Little. D. D.L. 532.
In re Smith v. Green. D. D.L. 520.*

1841.

ENGLAND v. DAVISON.

Where a cause in which several issues are raised on the pleadings is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. Therefore, where to a declaration, a defendant pleaded several pleas, and the arbitrator was not requested to find specifically on each, and he awarded merely that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, the award was held to be bad.

M*MARTIN* shewed cause against a rule nisi, obtained by *Ingham*, for setting aside an award. As a preliminary objection, he contended that the materials on which the application had been founded were insufficient. To the award were two attesting witnesses. No affidavit by either of them was produced, nor any affidavit accounting for the non-production of such an affidavit. This, it was submitted, was necessary.

COLERIDGE, J.—(After conferring with the Clerk of the Rules), was of opinion, that such an affidavit was unnecessary, except in cases where applications were made to enforce awards by attachment. In those instances, if such an affidavit was not produced, it was necessary to account for its absence.

Martin then proceeded to shew cause on the merits. The rule was obtained on two grounds; first, that the award is not final, as there is no finding on the second or last issues; and, second, that the said award does not contain any event by which the costs of the action, in respect of the second, or of the last issue, can be ascertained. It was an action to recover the amount of a reward which had been promised to any person who should give the first information as to who was the party who had committed a particular felony. The defendant pleaded first, non assumpsit; secondly, that the plaintiff did not give the first information; thirdly, a plea to which the plaintiff demurred, on which he had judgment; fourthly, a payment of 5*l*. in satisfaction. The action was referred to an arbitrator, and he awarded that the plaintiff had no cause of action whatever, in respect of the matters referred, and directed a verdict to be entered for the defendant. The objections to the award were those stated in the rule. Those objections were evidently founded on

the provisions contained in 1 Reg. Gen., H. T., 2 Wm. 4, s. 74 (a). The words of that rule were, "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." In the case of *The matter of Arbitration between Leeming v. Fearnley* (b), which was a replevin suit, the action, and all matters in difference touching the distress, were referred to arbitration: the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent at the time of the distress; that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed. The Court of King's Bench held, that the award did not shew who ought to pay the costs, which were to abide the event of the suit, and, consequently, that it was not final. Again, in the case of *Norris v. Daniel* (c), where the costs of an action, and of an award, were to abide the event of the award, and the arbitrators found that the plaintiff had a good cause of action on five out of eight counts; that the defendant should pay 5*l.* damages, and that no further proceedings should be had in the action, the Court held, that there was no award as to the three counts; no event to authorize the taxation of costs on those counts; and, consequently, that no part of the award could stand. Both those cases, however, which favoured the present application, were previous to that of *Dibben v. The Marquis of Anglesey* (d). That was an action of trespass. The defendant pleaded the general issue, and several justifications. The cause was referred to an arbitrator, the costs to abide the event. The arbitrator awarded in favour of the defendants on the general issue, and disposed of the rights contested in the pleas of justification, but did not, in his award, decide on, or notice

1841.
 ENGLAND
 v.
 DAVISON.

(a) *Ante*, vol. 1, p. 193.

(b) 5 B. & Ad. 403.

(c) 10 Bing. 507.

(d) 10 Bing. 568, S. C.; 2 Cr. & M. 722.

1841.

ENGLAND

v.
DAVISON.

the issues upon those justifications. The Court of Exchequer refused to set aside the award. There, Lord *Lyndhurst* said, "after finding that the defendants had not committed the trespasses, any inquiry into the truth of the special pleas could only have been material with reference to the question of costs. If any party wished to have a decision upon the special issues with that view, he should have distinctly requested the arbitrator to take that course. It is not suggested by the affidavits, that any such request was made. I think the arbitrator has substantially disposed of the matters referred to him. The rule must be discharged." That case was afterwards confirmed in the case of *Duckworth v. Harrison* (a). There, an action of debt was brought, and the defendant pleaded the general issue, and a set off. The cause was by consent referred to arbitration, "the costs of the reference and award to abide the event," and the arbitrators found, that the plaintiff was not entitled to recover in the action; and had not any cause of action against the defendant, but said nothing as to the set off. The Court of Exchequer held, that the award was final, and the defendant was entitled to maintain an action for the costs of the reference and award. The case of *Dibben v. The Marquis of Anglesea* was there cited in the course of the argument. Lord *Abinger* there said, "the Court at first entertained some doubts upon this objection, but they have finally come to the conclusion, that if the parties had intended that the arbitrators should award distinctly upon each issue in the action, they ought to have stated it. The arbitrator has decided the action, by saying, that the plaintiff was not entitled to recover; and we think that the words 'event of the award' must mean the event as to the action itself, and do not mean the event as to the determination of the particular issues, which, therefore, became immaterial." In the present case it did not appear that any application was made to the arbitrators specifically, to determine the

(a) 4 M. & W. 432.

particular issues to which the grounds of objection contained in the rule were pointed. On the authority, therefore, of those cases, it was clear that the award was sufficient. The case of *Hunt v. Hunt* (a) was also an authority to the same effect. There, it was held, that where several issues are referred to an arbitrator, it is not indispensably necessary for him to award on each issue, if his intention as to each of them is sufficiently clear from the general language of the award. That was a judgment of Mr. Justice *Patteson*, which he pronounced after taking time to consider. Here, it must be perfectly evident, from the language of the award, what was the arbitrator's intention with respect to each of the issues. It was true that the case of *Gisburne v. Hart* (b), the authority of *Dibben v. The Marquis of Anglesea*, was, in some degree, doubted; but the case of *Duckworth v. Harrison* was not cited. If the Court should be of opinion that the authority of *Dibben v. The Marquis of Anglesea* could not be supported, the Court would not absolutely set aside the award altogether but would so mould the rule, as to effect substantial justice between the parties, without the necessity of proceeding to a fresh inquiry into the matters disputed between the parties.

Ingham, in support of the rule, contended that as the award at present stood, it was impossible that the parties could proceed to tax their costs pursuant to 1 Reg. Gen., H. T., 2 Wm. 4, s. 64. It was, therefore, indispensably necessary that the award should be rectified. According to the current of authorities, it must be clear that the arbitrator had not sufficiently disposed of the matters referred to. The cases of the matter of *Leeming v. Fearnley*, and *Norris v. Daniel* were authorities to that effect. The case of *Dibben v. The Marquis of Anglesea* had been very much doubted as to its correctness, both by the profession, and in the case of *Gisburne v. Hart*. The case of *Duckworth v. Harrison*

1841.
 ENGLAND
 v.
 DAVISON.

(a) *Ante*, vol. 5, p. 442.

(b) *Ante*, vol. 7, p. 402, S. C., 5 M. & W. 50.

1841.
 ENGLAND
 v.
 DAVISON.

could only be considered as proceeding on the authority of *Dibben v. The Marquis of Anglesea*; and the last cited case, *Gisburne v. Hart*, must be considered as clearly overruling that of *Dibben v. The Marquis of Anglesea*. In *Hunt v. Hunt*, although Mr. Justice Patteson agreed to the general proposition stated in the marginal note to that case, yet he ultimately set aside the award, because the language of it did not come within that principle. That, therefore, could not be considered as an authority against the present application. The ground on which it was sought to support the award was, that an arbitrator was not bound to dispose of all the issues raised on the record, unless for the purpose of deciding the right to costs, he was requested so to do. That was a principle which was applicable to matters in difference not shewn upon the face of the record, because it would be unfair that an arbitrator should be expected to decide on matters of that description to which his attention was not expressly called, and on which he was not requested expressly to determine. The rule was, however, quite different, and, therefore, wholly inapplicable where particular issues were raised on the record; and the cause being referred to him, it must be clearly expected that he should expressly dispose of those issues. On these grounds, it was submitted, that the award could not be sustained.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for setting aside an award. By the submission, a cause, and all matters in difference, had been referred; and the costs of the action, the reference, and the award, were to abide the event of the award. The substantial objection to the award was, that there is no event ascertained by it, so that the costs of the action, in respect of certain issues, can be determined. The action was to recover a reward promised to the person giving the first information of the party guilty of a certain felony. The defendant pleaded, first, non-assumpsit; second,

that the defendant did not give the first information; a third plea was demurred to, on which plaintiff had judgment; and, fourth, a payment of 5*l.* in satisfaction. The arbitrator awards that the plaintiff had no cause of action whatever against the defendant, in respect of the matters referred, and directs a verdict to be entered for defendant. The defendant is, therefore, entitled to the general costs of the action; but the plaintiff objects, that by neglecting to find specifically on the second and last issues, it is impossible to ascertain what the taxation should be. And there certainly is, in fact, this difficulty; and I cannot see that it is at all removed by the distinction which Mr. *Martin*, for the defendant, sought to establish between issues raised on different counts, and issues raised on different pleas. For the materiality of the omission arises from the rule of Court, which distinguishes between the costs of action and the costs of the several issues; and that rule applies equally to pleas and to counts. What is to be the effect of this omission upon the award is not very clear upon the cases. I have examined them with attention. In *Dibben v. Marquis of Anglesea* (a), the Court of Exchequer decided that where a finding on specific issues was material only with respect to the costs, an award was not to be set aside for the omission to do so, unless the arbitrator had been requested specifically by the parties to award upon them. I believe this decision never met with the entire concurrence of the profession. In *Duckworth v. Harrison* (b), a replication was framed directly upon its authority. In the course of the argument, observations were thrown out, which certainly would lead one to expect a different conclusion of the case; but after time taken, Lord *Abinger*, in delivering the judgment, is reported to have said, "that if the parties had intended that the arbitrator should award distinctly upon each issue in the action, they ought to have stated it." This is laid down without any qualification; but, in the

1841.
 ENGLAND
 v.
 DAVISON.

(a) 10 Bing. 568.

(b) 4 M. & W. 432.

1841.

ENGLAND

v.
DAVISON.

submission to reference, nothing had been expressly said about the costs of the action ; the costs of the reference and award, it was agreed, should abide the event of the award. This distinguishes the case from the present. The judgment, however, sustains *Dibben v. Marquis of Anglesea* ; but in *Gisborne v. Hart* (a), where, by the order of reference, the costs of the suit were to abide the event, and the objection to the award was, that there was an omission to find upon the count, on an account stated, the same Court threw great doubts on *Dibben v. Marquis of Anglesea*, and decided that the award was clearly bad, for not disposing of all the issues. *Duckworth v. Harrison* does not appear to have been cited. I certainly cannot acquiesce in the reason on which *Dibben v. Marquis of Anglesea* is founded. There is no doubt that, as to mere matters of fact, of which the arbitrator cannot be supposed to know anything, but from the parties, an omission to decide on that which is not brought to his notice, is no fault in him ; for it cannot be said then to have been a matter of difference. But where the agreement or order of reference places the very point in view, it seems to me that neither notice nor request is necessary to make it the arbitrator's duty to decide on it. The state of the authorities leaves me at liberty to decide on principle ; and I should, therefore, hold the award to be defective, on the ground alleged. But I am not, therefore, bound to set the whole award aside. The rule here, in terms, points to the second and last issues. If, then, the defendant will allow the costs on those issues to be taxed for the plaintiff, the objection will be removed. A similar course was taken by this Court in the matter of *Leeming v. Fearnley* (b). Upon these terms, therefore, to which I think I ought to add the payment of the costs of this rule, let the rule be discharged.

Rule discharged.

(a) 5 M. & W. 50.

(b) 5 B. & Ad. 403.

1841.

PITT v. PARKER.

CLEASBY moved for a rule, to shew cause why it should not be referred to the Master to compute the amount of principal and interest due to the mortgagee by the mortgagor on two mortgage deeds. It appeared, from the affidavit on which he moved, that interlocutory judgment had been signed on the 17th of April, which was in Easter Term. The plaintiff died on the 20th of the same month. The question was, whether, under those circumstances, a rule to compute could be obtained? It was submitted that it might. In the case of *Berger v. Green (a)*, where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the term, the Court granted a rule to compute principal and interest on the bill, on which the action was brought; as the judgment would have relation to the day of its signing.

Where a mortgagee died on the 20th of April, interlocutory judgment having been signed on the 17th, in Easter Term, the Court refused to grant a rule for referring it to the Master to compute principal and interest on the mortgage deed, the application being made in Trinity Term.

WIGHTMAN, J.—Now there is no relation to any other day than that on which final judgment is signed. In this case, it would appear that final judgment had been signed after the death of the plaintiff. But even according to the old practice, it could only relate back to the first day of the present Term, we now being in Trinity Term.

Rule refused (*b*).

(a) 1 Mau. & Sel. 229.

(b) See *Blackburn v. Godrick*, ante, p. 337, in which case it was held that where an instalment on

a cognovit became due, after the death of a defendant, the Court would not allow judgment, to be entered up nunc pro tunc.

1841.

THE QUEEN *v.* SPACKMAN, in re the BLANDFORD ROADS.*(Before the four Judges.)*

Where an order of Sessions has been returned to this Court under a certiorari, and a rule is then obtained to quash the order, it is a good preliminary objection to an argument on such rule that no notice of it has been served on the justices who made the order, although served on the parties interested in supporting it.

A RULE had been obtained for quashing an order of sessions. The order had been returned in the regular manner in obedience to a certiorari, and this rule was then obtained. Notice of the rule was served on the private parties interested in supporting the order, but not on the justices.

Hodges, who appeared to shew cause against the rule, insisted on this want of notice to the justices as a preliminary objection.

Archbold, *contra*, contended that such an objection could not be maintained where the order, as in this case, was not merely irregular, but void.

PER CURLAM.—To hear an argument to shew that the order is void, is to hear the case argued on the merits. The preliminary objection prevents the Court from doing that. The rule must be discharged.

Rule discharged.

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I N D E X
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P R I N C I P A L M A T T E R S.

ABATEMENT.

See AMENDMENT, 1.

ABATEMENT, (PLEA IN).

See PLEA, (IN ABATEMENT).

ACCEPTOR.

See DECLARATION, 2.

ACCOUNT, (ERRORS IN).

See PLEA, 13.

ACCOMMODATION BILL.

See IRREGULARITY, 3.

ACCOUNT, (MERCHANT'S).

See STATUTE OF LIMITATIONS.

ACCOUNT STATED.

See PLEA, 13.

ACKNOWLEDGMENT BY MARRIED WOMAN.

1. An affidavit verifying a certifi-
VOL. IX.

cate of an acknowledgment made by a married woman under the Fines and Recoveries Act, (3 & 4 Wm. 4, c. 74,) made by a notary public, at Carlsruhe, the commissioner taking the acknowledgment having declined to make an affidavit: *Held*, sufficient. *Re Pearsall*, 46

2. In support of an application for a married woman to be permitted to convey her interest in an estate, without the concurrence of her husband, an affidavit was produced, sworn by the sister of the married woman, who stated that the person, on whose behalf the application was made, was speechless; the Court refused to grant the application without an affidavit, that the married woman herself had been examined. *Ex parte Mary Williams*, 72

3. Where on an application to file the certificate of acknowledgment of a married woman under the 3 & 4 Wm. 4, c. 74, taken at St. Petersburg, the affidavit verifying the certificate was sworn before the British consul in Russia, but it was stated that the local magistrates were not

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empowered to take affidavits, the Court allowed the certificate to pass, as being duly verified. *Re Daly*, 380

4. The certificate of the acknowledgment of two married women taken under the 3 & 4 Wm. 4, c. 74, stated them to have acknowledged the execution of indentures of lease and release; they were parties only to the indentures of release: The Court, upon motion, refused to order the amendment of the certificate. *Ex parte Witty and Salt*, 838

5. The affidavit verifying the acknowledgment of a married woman, taken in Philadelphia commenced as follows: "Be it remembered, that on the 10th of December, 1840, came before me, T. B. Esq., Alderman of Philadelphia, &c., J. S., &c., and in due course of law, deposed and sworn, &c.," it then proceeded in the form of an affidavit, was subscribed by the deponent, and was accompanied by the usual notarial certificate. The Court directed the affidavit to be received, although it was not in exact compliance with the rule of H. T., 4 Wm. 4. *Ex parte Alice Shaw*, 839

6. The Court will not dispense with the affidavit of a married woman herself, upon an application under the 91st section of the 3 & 4 Wm. 4, c. 74, for an order for the conveyance of the property of the wife, without the concurrence of her husband. *Ex parte Bruce*, 840

ACTION, (RIGHT OF).

See DECLARATION, 3.

ADMINISTRATOR.

See ATTORNEY, (BILL OF), 1.
COVENANT, 2.

WARRANT OF ATTORNEY, 13.

ADULTERY.

See PROCHEIN AMY, 1.

AFFIDAVIT.

AFFIDAVIT.

See ACKNOWLEDGMENT OF MARRIED WOMAN.

BASTARD, 2.

BRIGHTON COURT OF REQUESTS, 3.
OFFICE COPIES OF AFFIDAVITS.

1. The following is a sufficient addition of a deponent to an affidavit. "Augustus Ackermann, of No. 21, Tokenhouse Yard in the City of London, notary, clerk to Charles Knight, of the same place." *Cooper v. Folkes*, 46

2. An affidavit to obtain a *capias* under the 1 & 2 Vict. c. 110, need not be entitled in the cause, if made before the writ of summons is sued out. *Schelleter v. Cohen*, 277

3. The Court will not reject affidavits merely upon the ground of their staleness. *Wynne v. Wynne and Another*, 396

4. If the date mentioned in the jurat of an affidavit is struck out with a pen, and the right date introduced, it is an erasure within Reg. Gen., 37 Geo. 3, which will prevent the affidavit from being heard. *Chambers v. Barnard*, 557

5. It is now an established rule that affidavits sworn by the plaintiff or defendant in the cause, are excepted from the operation of Rule 5, of H. T., 2 Wm. 4, and that the addition and degree of such persons need not be inserted in the description of the deponent, but they may describe themselves as such plaintiff or defendant respectively. *Shirer v. Walker*, 667

6. Where an order for a *capias* under the 1 & 2 Vict. c. 110, s. 3, was obtained upon an affidavit, signed by the deponent, but the jurat was not signed by the judge before whom it was sworn, until after the order was made and acted upon, the Court set aside the proceedings for irregularity. *Bill v. Bament*, 810

AMENDMENT.

AFFIDAVITS (FILING).

1. Where a party improperly delayed in serving a rule, and on that ground, the rule was enlarged, the Court would not compel the party enlarging the rule to comply with the usual condition of filing his affidavits previous to shewing cause. *Regina v. Anderson*, 104

AFFILIATION (ORDER OF).

See BASTARD, 3.

AGREEMENT.

See STAMP, 2.

AMENDMENT.

See ACKNOWLEDGMENT OF MARRIED WOMAN, 4.

RECOVERY,
VARIANCE, 3, 6.

1. Where a plaintiff has made too many persons defendants, the Court will, previous to trial, allow the name of one to be struck out of the proceedings, subsequent to the writ, on payment of costs, the remaining defendant being allowed to plead de novo. *Palmer v. Beale and Another*, 529

2. After an insufficient levy, under a fi. fa., in Yorkshire, where the venue in the action was laid, the plaintiff, on the 6th of July, issued a ca. sa. reciting the fi. fa. and return, into Middlesex, for the residue. On the 31st of August, and before the Middlesex writ was executed, he issued a ca. sa. for the residue into Yorkshire, under which the defendant was taken and discharged, in September, on the ground of privilege. In January following, the defendant was taken under the writ into Middlesex. *Held*, on motion to discharge him out of custody, that the writ into Middlesex ought to have been a testatum ca. sa. founded on a ca. sa. into Yorkshire, and was irregular, and that the Court

APPEAL (HEARING). 1063

could not amend it by the ca. sa. into Yorkshire, which bore a later date. *Towers v. Newton*, 576

3. In a declaration in ejectment to recover possession of premises, by reason of a forfeiture, the day of the demise was stated to be the 15th of January. At the trial, it appeared that this was a date antecedent to the day on which the right of entry accrued. *Held*, that this was a case in which the learned judge was authorized under the 3 & 4 Wm. 4, c. 42, s. 23, to amend the record by altering the day of the demise, and that the power of amendment was not affected by the applicability of the consent rule, to confess lease, entry, and ouster, to the declaration as it originally stood, but that the terms of that rule would apply themselves to the declaration as soon as the amendment was made. *Doe d. Edwards v. Leach*, 877

APPEAL (TO QUARTER SESSIONS.)

See CERTIORARI, 2.

NOTICE TO PRODUCE.

Where a parish gives notice of appeal under the 4 & 5 Wm. 4, c. 76, s. 79, against an order of removal, within twenty-one days after service of the order of removal, but does not prosecute the appeal at the next practicable sessions, and the respondent parish does not remove the pauper for a considerable time afterwards, the appellants may give fresh notice of appeal, pursuant to 13 & 14 Car. 2, c. 12, s. 2, when the pauper is actually removed. *Regina v. The Justices of Middlesex*, 163

APPEAL (HEARING).

Where a notice of appeal described the order of removal as made by R. H. Cundy, and another magistrate, instead of B. Cundy, there being two magistrates in the county, whose re-

spective christian names commenced with those initials, and the Quarter Sessions refused to hear the appeal, on the ground of the variance, the Court granted a mandamus to compel the hearing of the appeal. *Regina v. The Justices of Denbighshire*, 509

APPEARANCE.

See IRREGULARITY, 2.
NON PROS.

An appearance entered by the plaintiff's attorney for the defendant is irregular, if it omits the words "according to the statute," as prescribed in the form contained in the schedule to the 2 Wm. 4, c. 39. (The Uniformity of Process Act). *Codrington v. Curlewis*, 968

APPRENTICE.

See STAMP, 3.

ARBITRATION.

See DEPOSIT (IN LIEU OF BAIL), 5.
PARTICULARS, 1.
PLEA, 8.

1. Where a cause in the Exchequer has been referred by a judge's order, and it is part of the order that it shall be made a rule of the Queen's Bench, there is no objection to its being so made. *Milstead v. Craufield*, 124

2. By an agreement of reference to arbitrators, with power to appoint an umpire, it was covenanted that the umpire should make his award two calendar months *after* his appointment. He was appointed on the 29th of June, and afterwards the time for making his award was enlarged by consent for three months further. The Court held that the 29th of June was to be excluded from the calculation of time, and, therefore, that the award being made on the 29th of November, was made in due time. *In the matter*

ARBITRATION.

of Arbitration between Higham and Jessop, 203

3. The 3 & 4 Wm. 4, c. 42, s. 39, is not confined to cases in which either party has attempted to revoke a submission to arbitration, therefore, where two causes were referred to an arbitrator, so that he should make his award on a particular day, or on such ulterior day as he should appoint, and the arbitrator allowed the time limited for making his award to expire: *Held*, that the Court had power, under the above act, to enlarge the time. *Newman v. Parbury. Parbury v. Newman*, 288

4. The Court will not set aside the certificate of an arbitrator any more than an award, on the ground of a mistake as to the effect of evidence. *Price v. Price*, 334

5. Where it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the Court to object to the absence of a stamp on the award, and, therefore, to refuse to draw up the rule. *Hill v. Slocombe*, 339

6. An action of trespass was referred by order of nisi prius. The defendant pleaded, first, not guilty, and secondly, a justification. The arbitrator awarded "that as the defendant has not proved his plea, the verdict for the plaintiff ought to stand," and then stated a number of reasons for his opinion, which could not be considered as satisfactory. The Court held the adjudication sufficient, and declined to consider the sufficiency of the reasons assigned by the arbitrator. *Archer v. Owen*, 341

7. Where an arbitrator awards damages for an injury caused by the defendant to the plaintiff's property, by acts done in the adjacent property of the former, and then having power to direct the mode of enjoying the property for the future, he awards

that the parties shall respectively enjoy it as heretofore, the award is not final, and, therefore, bad. *Ross v. Clifton*, 356

8. The Court will not allow cause to be shewn against a rule for setting aside an award on the last day of Term. *Bignold v. Gale*, 393

9. A cause and all matters in dispute were referred to the decision of two merchants and a legal arbitrator; the arbitrators met, and two of them agreed, upon the merits, to find in favour of the plaintiff, but the lay arbitrators agreed to leave a point of law which had arisen, to the decision of the barrister. The legal arbitrator decided that point in favour of the plaintiffs, and executed the award at Birmingham, in accordance with his own views: on the next day, the award was executed in London by one of the lay arbitrators also in favour of the plaintiffs: *Held*, that the award was bad as being a decision by one arbitrator, pursuant to a power delegated to him by the other arbitrators, they having no authority so to delegate. *Little and Others v. Newton*, 437

10. A clause in a partnership deed, authorizing a reference in case of disputes between the partners, and the making the "award" of the arbitrator, instead of the "submission" a rule of Court, if it does not appear that "award" was used by mistake for "submission," is not within the meaning of the 8 & 9 Wm. 3, c. 15, s. 1, and, therefore, a judge has no power to order witnesses to attend an arbitrator acting in such a matter. *In the Matter of Arbitration between Woodcroft and Jones*, 538

11. Where there did not appear to have been any misconduct on the part of the parties or arbitrators, the Court refused to direct a submission to arbitration to be revoked, *Ib.*

12. In order to justify an arbitrator proceeding *ex parte*, a very strong case

must be shewn of wilful delay by the party not attending; and, therefore, if a reasonable excuse for his not attending is shewn, the Court will set aside an award made pursuant to such a proceeding. *Gladwin v. Chilcote*, 550

13. The Court will not, on disposing of a rule for setting aside an award on that ground, decide the question whether the party against whom the award is made, shall pay the costs arising from his delay; but a separate motion for that purpose must be made, *Ib.*

14. An arbitrator to whom a cause in which several issues were joined, was referred, the costs to abide the event, disposed of each issue, and then, although no power for that purpose was given to him, awarded a *stet* process: *Held*, that although this was an excess of authority, the award was only bad as to that part, and good as to the rest, and the parties might proceed to tax their costs on it. *Ward v. Hall*, 610

15. The defendant moved to set aside an award which had been made by two arbitrators against him, upon the grounds that the arbitrators had improperly received evidence in the absence of the defendant, and had also been guilty of improper conduct in holding meetings, and conferring with the plaintiff's attorney, with respect to the matters in difference, in his absence. It appeared that the defendant was aware of the existence of these grounds of objection, many days before the award was made, but that he made no objection before the arbitrators, and also that he had had notice of the meetings, at which the evidence was received, and had been summoned to produce books at them, but that he had omitted to attend: *Held*, that although it would have been more regular for the arbitrators to send notice of the result of the examinations, to the defendant, yet that the Court

would not, under the circumstances, set aside the award for such irregularities as were disclosed. *Bignall v. Gale*, 681

16. A cause, and all matters in dispute at the time of an order of reference were submitted to the decision of an arbitrator, by the order of a judge: The arbitrator awarded, that the defendant should pay to the plaintiff the sum of 184*l.*, for a balance and interest found to be due at the date of the order of reference, "excluding from such an account, a claim on the part of the plaintiffs, for a loss alleged to have been sustained by them to the amount of 32*l.* 19*s.* on certain varnished hats;" and as to the said claim, in respect of the said varnished hats, he found "that no sufficient evidence had been laid before him by the plaintiffs to shew, that at the date of the said order of reference, they had sustained any loss on the said hats, and upon that ground, and for want of sufficient evidence of such loss, he awarded that the plaintiffs were not entitled under the reference to recover anything in respect thereof:" *Held*, a final adjudication of the matters submitted to reference. *Cockburn and Another v. Newton*, 676

17. By an order of reference, the costs of the cause were ordered to abide the event of the award; the arbitrator decided the suit in favour of the defendant, and ordered the plaintiff, on a certain day, to pay him those costs: *Held*, no objection to the award, for that the defendant was not deprived of any right which he possessed to recover the costs at an earlier date, *Ib.*

18. An action of trespass was referred to arbitration, and by the order of reference, the arbitrator was to have the same power to certify as a judge at nisi prius. The arbitrator found for the plaintiff, with 1*s.* damages, and certified in his award, under the 3 & 4 Vict. c. 24, that the action was

brought to try a right besides the mere right to recover damage.

Held, that the certificate was valid, and that it need not be indorsed on the back of the record. *Held*, also, that in such case, the certificate must be given at the time of making the award. *Spain v. Cadell. Same v. Same*, 745

19. Testator, by his will, devised an annuity, or yearly rent-charge of 20*l.* to Sarah, the wife of Julius Wynne "so long as her conduct and behaviour should be discreet, and meet with the approbation of his (the testator's) wife, or which, in case of her death, should be approved of by the survivor or survivors of his trustees;" In an action of replevin, in respect of a distress made for arrears of the annuity, the plaintiff pleaded to the avowry that the conduct of Sarah was not discreet, and that the same was not approved of by the survivor of the trustees of the testator. Issue. At the trial, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom "the whole of the said cause, and all matters relating to the annuity in the said cause in question" were referred. At a meeting held by the arbitrator, the defendants offered in evidence, a certificate of two trustees, one of whom was since dead, that the conduct of Sarah had been approved of; the arbitrator rejected the evidence, and stated that the issue was not proved; at a subsequent meeting, evidence was given of the payment on the annuity for a series of years, and the arbitrator eventually made his award for the defendants. Upon an application, by the plaintiff, to set aside the award, on the ground that he had been misled by the declaration of the arbitrator, that the issue was not proved, the Court refused to grant the motion, there being no statement made, that the plaintiff would have called the surviving trustee to nega-

tive the allegation of approbation of the defendant's conduct, and it being consistent with the facts proved that the arbitrator might have drawn his conclusion from them, without reference to any evidence of approval of the defendants' conduct.

By his award, the arbitrator directed the payment of two sums, namely, 50*l.*, in respect of arrears, due before the commencement of the action, and 40*l.* in respect of the amount which had since accrued due : *Held*, that the award was good, the terms of the order, referring "the whole of the said cause, and all matters relating to the annuity in the said cause in question," including not only the subject matter of the action, but all matters relating to the annuity in question in the cause.

The sums awarded to the defendants, who were husband and wife, were directed to be paid to the wife Sarah. Upon a former application to the Court, to which the plaintiff was made a party, that the husband of Sarah might appear by a separate attorney to represent his separate interests, the motion had been refused upon an indemnity being given to the husband : *Held*, that the award was not bad, by reason of the payments being ordered to be made to the wife. *Wynne v. Wynne and Wife*, 901

20. Affidavits used in answer to an application to set aside an award made pursuant to a submission to arbitration by deed, must be stamped, notwithstanding the 5 Geo. 4, c. 41, which repeals the 54 Geo. 3, c. 184, as to stamps on legal proceedings in general. *In the matter of Arbitration between Templeman and Reed*, 962

21. A cause, and all matters in difference, were referred to the award of two named persons, and such third person as they should appoint, or of a majority of them. A difference having arisen between the originally named arbitrators, a statement was

made by each to the third as to what he thought the award should be. An award having been made by an umpire and one of the arbitrators, without any further meeting, the Court set aside the award, *Ib.*

22. An arbitrator on a reference with respect to the right to a certain house and premises, directed certain conveyances to be executed by one party to the other, and awarded, that in case of any dispute arising with respect to the form of those conveyances, those disputes should be settled by such counsel or solicitor as he should appoint. The Court set aside the award, on the ground that the arbitrator, by reserving a future power to himself to delegate the authority to determine disputes between the parties was an excess of authority, and, therefore, set aside the award, as this direction could not be separated from the rest of the award. *In the matter of Arbitration between Tandy and Tandy*, 1044

23. Where a cause in which several issues are raised on the pleadings is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. Therefore, where to a declaration, a defendant pleaded several pleas, and the arbitrator was not requested to find specifically on each, and he awarded merely that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, the award was held to be bad. *England v. Davison*, 1052

ARBITRATOR, (POWER OF.)

See ARBITRATION, 9, 11.

ARGUMENTATIVE TRAVERSE.

See PLEA, 10.

REPLICATION, 10.

ARREST.*See* PRISONER.**ARREST, (PRIVILEGE FROM).***See* BARRISTER.**ARREST (WITHOUT PROBABLE CAUSE).**

Where a defendant was arrested, and without putting in special bail, he was discharged under 1 & 2 Vict. c. 110, s. 7, he was held not to be entitled to his costs under 43 Geo. 3, c. 46, s. 3. *Bennett, Executor of, &c. of Barker v. Burton,* 492

ARTICLED CLERK.

1. Where a clerk has been articled to one of the members of a firm, and he covenants to serve him, a service with a partner, after the decease of the master, is not service under the articles, although the partner was a party to the articles. *Ex parte Dalton,* 110

2. Where an articled clerk has served his whole period of five years, but has not attained the age of twenty-one years, if he will shortly attain that age the Court will, under certain circumstances allow him to be examined though still an infant. *Ex parte Tebbs,* 151

3. Where a clerk is articled to an attorney, who, during the continuance of the articles, absconds, the Court will grant a rule to discharge the clerk from his articles, and permit it to be served at his last place of abode, in Q. B. Office, and on his agent, if he has one. *Ex parte Wilkinson,* 320

4. Where a clerk is discharged from his articles, on the ground of his master's insanity, he must be articled to another attorney for the residue of the term of five years unelapsed at the time of the insanity commencing, and a portion of the time served after that event, with other attorneys carry-

ATTACHMENT.

ing on the master's business, cannot be reckoned. *Ex parte Brown,* 526

5. The Court will, under special circumstances, permit an articled clerk to be examined before he attains the age of twenty-one. *Ex parte Bosfield,* 616

ASSIGNEE.*See* FEIGNED ISSUE.

INTERPLEADER, 2.

WARRANT OF ATTORNEY, 6, 11.

ASSOCIATE.*See* JUDGE'S POWER, 1.**ASSUMPSIT.***See* COVENANTS, 1, 2, 3.**ATTACHMENT.**

See ATTORNEY (UNDERTAKING OF), 1, 2.

RESTITUTION (WRIT OF).

WITNESS, 6.

1. A witness, on being served with a subpœna, received 1s. only, as conduct money, but she went to the assize town, where the trial was to take place, without making any further demand. On the morning of the trial, she refused to proceed to the Court-house, unless she received 9*l.*: *Held,* that the plaintiff having made no tender to her of a reasonable amount for her expenses in going back, was not entitled to an attachment against her for disobedience to the subpœna. *Newton and Wife v. Harland and Others,* 6

2. A cause was referred to an arbitrator, the costs of the suit being directed to abide the event of the award. The award was in favour of the defendant, who taxed the costs of the cause, which the plaintiff had neglected to pay. The Court granted a rule for an attachment absolute in the first

instance. *Daniels and Others v. Wealds and Others*, 44

3. A writ of subpoena duces tecum required a defendant's attorney to appear on a particular day, but did not command him to appear "from day to day," after that day. The cause was postponed at the instance of the defendant, and the attorney did not appear on the day when the cause was called on. The Court refused an attachment for disobedience to the subpoena. *Vaughton v. Brine and Others*, 179

4. Where a rule nisi for an attachment for non-payment of costs, pursuant to an award, has been obtained in one Term, and dropped in consequence of negotiations between the parties, and part of the costs are paid, if it is sought to obtain an attachment for the non-payment of the residue, the rule for that purpose cannot be drawn up on merely reading the dropped rule, and an affidavit of fresh demand.

The Court will discharge a rule obtained on such materials, with costs, if an action for the recovery of the sum in dispute was pending at the time of the demand. *Baker v. Wells*, 323

5. Where a rule of Court in an ejectment, required possession of certain premises to be delivered up, but did not mention by whom, the Court refused to make a rule absolute for an attachment against the tenant in possession for not delivering them up; and, as he was a stranger to the ejectment, also refused to grant a rule requiring him to deliver up possession. *Doe dem. Lewis v. Ellis*, 944

6. On an application for an attachment for non-payment of money, pursuant to an award, the affidavit of the money, being still due may be made by the attorney where it has been demanded by letter of attorney. *Regina v. Paget*, 946

7. Where one of two partners at-

torneys in the country, directed that a particular rule of Court should be served on the London agent of the firm; it was held, that such service was not sufficient to bring the other partner into contempt, in case of disobedience to the rule, though it was sufficient as to the one who wrote the letter. *In the matter of Holiday*, 1020

ATTESTING WITNESS.

See WARRANT OF ATTORNEY, 2.

ATTORNEY.

See ARTICLED CLERK.

ATTACHMENT, 6.

ATTORNEY (RE-ADMISSION OF), 3.

BANKRUPT, 1.

COGNOVIT.

IRREGULARITY, 2.

NEW TRIAL, 1.

STAMP, 4.

1. Where an attorney had omitted to take out his certificate for a year, after the expiration of his last certificate, and the last day of that year, (15th November,) was a Sunday, he having applied at the Stamp Office, to renew his certificate, on the 16th, but was refused, the Court allowed him to be re-admitted, without the usual notices, and without payment of fine, or arrears of duty, he not having practised during the period of his being off the roll, and his application to be re-admitted being made on the 17th of November. *Ex parte Knipe*, 108

2. Where a plaintiff in an action against an attorney, for negligence in the conduct of a suit, alleges that he was "forced to pay" certain sums in consequence of the defendant's negligence, he can only recover the amount actually paid by him, although a liability to a greater amount on the part of the plaintiff has been incurred, in consequence of the alleged negligence. *Jones v. Lewis*, 143

1070 ATTORNEY, (BILL OF.)

3. Where an attorney applies to be struck off the roll at his own request, he must not only swear, that no proceedings are pending against him, but also that he expects none. *Ex parte Gray*, 336

4. If an attorney receives, in the character of steward, money from his client, which it is suggested was improperly so received, the Court will not compel him, summarily, to refund it. *Ex parte Faith and Another*, 973

ATTORNEY AND AGENT.

See ATTACHMENT, 7.

RULE, (SERVICE OF,) 1.

1. Where an attorney being off the roll, in consequence of not taking out his certificate, employed his agent to sue out process, and costs were paid in the action to the agent, the Court would not compel either the attorney or his agent to refund those costs. *Nash v. Goode and Parry*, 929

ATTORNEY, (BILL OF.)

See TAXATION, 2, 3.

1. Where the administrators of an attorney, send in their intestate's bill, and a judge's order is made to tax it, and more than one-sixth is taken off by the Master, the administrators are not bound to pay the costs of taxation, although they consented to the judge's order being made. *Priestley v. Gray and Wife*, 154

2. Where business is done by an attorney for a person who afterwards becomes an attorney, the former need not deliver a signed bill previously to bringing an action against the latter. *Winsor v. Herbert*, 237

3. In an action on an attorney's bill, the day on which it is delivered, is not to be reckoned as one of the days of the month given to the client by the statute. *Blunt v. Haslop*, 982

4. A bill of costs for business done by an attorney on behalf of the as-

ATTORNEY, &c.

signees of a bankrupt's estate, before a country commissioner, appointed under 1 & 2 Wm. 4, c. 56, is not a taxable bill; and, therefore, an action may be brought to recover the amount of such a bill, without delivering a bill a month before action brought, under the provisions of the 2 Geo. 2, c. 23. *Harper and Another v. Williams and Another*, 618

ATTORNEY, (CERTIFICATE OF.)

See ATTORNEY, 1.

ATTORNEY AND CLIENT.

See ATTORNEY, (UNDERTAKING OF,) 1, 2.

TAXATION, 2, 7.

WARRANT OF ATTORNEY, 12.

ATTORNEY GENERAL.

See DISORDERLY HOUSE, 2.
LOTTERY.

The Attorney General has a right of audience, before the Tubman and Postman, when moving on business in which the Crown is interested. *Regina v. Bishop of Exeter*, 276

ATTORNEY (RE-ADMISSION OF).

See ATTORNEY, 1.

1. Upon an application for the re-admission of an attorney, the Court will not dispense with the notice required to be stuck up in the office of the Chief Justice. So where the notice had been stuck up five days before the commencement of Term, and the application was made on the first day of Term, the Court refused to grant the rule. *Re W. Tacker*, 661

2. A conviction of a conspiracy to extort money by means of libels, is a sufficient ground for not permitting an

BAILING (FELON).

attorney to be re-admitted. *In the matter of Hawdone*, 970

3. Where an attorney had, by mistake, omitted to take out his annual certificate in due time, and a year had elapsed from the expiration of his last certificate, he having discovered, on the 16th of November immediately after the expiration, the omission made, the Court allowed him, on the 19th, to be re-admitted, without the usual notices, on payment of a fine of 20s., and the arrears of duty. *Ex parte Wybrow*, 197

ATTORNEY (UNDERTAKING OF).

1. Where an attorney being employed to sue a defendant, gave his undertaking for the debt sought to be recovered to his own client, the Court refused to enforce the fulfilment of that undertaking by attachment. *Ex parte Evans*, 106

2. Where an attorney undertook to pay the sum which should be awarded to be paid by his client in a particular reference, the arbitrator being to make his award by a particular day, but did not do so, and a judge's order for enlarging the time was made by consent, the attorney acting on that occasion for his client, the Court held him discharged from his undertaking, he not having recognized it after the original time for making the award had expired. *Staitte v. Haddon*, 995

AWARD.

See ARBITRATION,
ATTORNEY (UNDERTAKING OF)
2.

AWARD (STAMPING).

See ARBITRATION, 5.

BAILIFF (SPECIAL).

See SHERIFF, 4.

BAILING (FELON).

1. The Court will grant a rule nisi

BANKRUPT. 1071

for bailing in the country, a party charged with a felony without the production of an affidavit of his poverty. *Regina v. Gregory*, 129

2. The principle on which a party committed to take his trial for an offence may be bailed, is founded on the probability of his appearing to take his trial, and not on his supposed guilt or innocence, but the fact of a bill having been found against him, is material in estimating that probability. *Regina v. Scaife and Wife*, 553

BANKING COMPANY.

See DECLARATION, 1.
PLEA, 7.

BANKRUPT.

See ATTORNEY (BILL OF) 4.
EJECTMENT, 9.
FEIGNED ISSUE, 2.
INTERPLEADER, 2, 4.
PLEA (ISSUABLE).
SECURITY FOR COSTS, 1.
SPECIAL CASE.
WARRANT OF ATTORNEY, 6.

1. The 2 & 3 Vict. c. 29, (which renders valid executions *bonâ fide* levied against the goods of a bankrupt notwithstanding a prior act of bankruptcy,) has not such a retrospective effect as to apply to cases in which a fiat had issued, and the assignees were appointed before the passing of that act. *Moore and another, Assignees of Henry Tompkins, a Bankrupt v. Phillips, Esq.*, 294

2. Where a bond is given pursuant to 1 & 2 Vict. c. 110, s. 8, the Court in which the action is brought, has power to direct it, when satisfied, to be delivered up to be cancelled, although the plaintiff's attorney may have a lien upon it for costs; and it is not necessary to apply to the Court of Bankruptcy, for that purpose. *Wilson v. Firth*, 573

3. The time of delivering out a fiat in bankruptcy as an operative instrument, is "the date and issuing" within 2 & 3 Vict. c. 29, and, *prima facie*, the time of delivering it out of the Bankrupt Office is that time. *Pewtress and Others v. Annan*. 828

4. A docket was struck, and a fiat bespoke and paid for at twelve o'clock. About two the bankrupt's goods were seized under a *fieri facias*. On the same day, but after the seizure, the fiat was called for, and obtained from the Bankrupt Office. It did not appear whether it had been, at any previous time delivered out to the petitioning creditor or any person on his behalf; *Held*, that the execution was protected by 2 & 3 Vict. c. 29, *Ib.*

5. Where the trading sought to be proved, was that of a money scrivener, under the 2nd section of the 6 Geo. 4, c. 16, which provides that persons using the trade or profession of a scrivener, "receiving other men's monies or estates into his trust or custody," it was held that the words of the act were not supported by proof that the bankrupt had negotiated loans, and had received procuration money for doing so, the money lent not being deposited in his hands; and, that in one instance, he had been employed to call in money which was out upon mortgage, which money he received and retained in his possession, but for which he paid interest down to the time of the bankruptcy. *Loft v. Melville*, 882

BANKRUPTCY.

See TAXATION, 3.

BARRISTER.

A barrister is not privileged from arrest on final process while attending in the ordinary way at quarter sessions although he has been actually engaged in a case at the sessions. *Newton v. Constable*, 933

BILL OF EXCHANGE.

BASTARD.

See INDICTMENT, (QUASHING).

1. An order of Quarter Sessions made under the 4 & 5 Wm. 4, c. 76, s. 73, and the 2 & 3 Vict. c. 85, ss. 1, 3, requiring the overseers to pay the costs of the putative father of a bastard, against whom an application has been made, must state an application to the justices at petty sessions, the recognizance to appear at Quarter Sessions, and the transmission of that recognizance to the Quarter Sessions. *Regina v. the Justices of Hampshire*, 171

2. If it does not state those matters, the defect cannot be supplied by affidavit, *Ib.*

3. It is not an objection to the order, that it does not state the mother to have been settled in the parish applying, or chargeable thereto, or that the consent of the guardians to the applications was obtained, *Ib.*

4. A poor law union consisted of several places, over which different divisions of justices had jurisdiction: *Quære*, whether a bastardy order can be made by one division, where the child has become chargeable in another. *Ex parte The Guardians of Wallingford Union*, 987

5. An application having been made for such an order, and the justices of one division declining to make it, on the ground that they had no jurisdiction in another: a rule for a mandamus to compel them to make it was discharged, *Ib.*

BILL OF ATTORNEY.

See ATTORNEY, (BILL OF).

BILL OF EXCHANGE.

See DEBT.

DECLARATION, 2.

INTERPLEADER, 1.

PARTNER.

PLEA ISSUABLE.

REPLICATION, 1, 3, 8.

RULE, (SERVICE OF), 3.

CARRIERS.

BIRTHS, (REGISTRAR OF).

See REGISTRAR OF BIRTHS.

BOND.

See PLEA, 4, 5.
STAMP, 1.

BRIGHTON (COURT OF REQUESTS).

1. In order to support an application to stay proceedings from the Brighton Court of Requests Act, a writ of certiorari must issue, the rule for which is absolute in the first instance. *Franks v. Wicks*, 178

2. Where a plaint is removed by certiorari out of the Brighton Court of Requests into the Queen's Bench, the affidavit used on an application in the cause so removed, may be entitled in the Queen's Bench, *Ib.* 489

3. When the judge of that Court, in his return to the certiorari, omits some of the proceedings which have taken place, with respect to the plaintiff's claim, the omission may be supplied by affidavit, *Ib.*

4. A "dismissal" by the judge of the plaint of the plaintiff, after hearing witnesses on both sides, is equivalent to a final determination on the merits, and not merely to a nonsuit, *Ib.*

CAPIAS.

See AFFIDAVIT, 2, 6.

CAPIAS AD SATISFACIENDUM.

See AMENDMENT, 2.
IRREGULARITY, 4.
RENDER, 3.

CARRIERS.

In a declaration against a common carrier for refusing to carry goods it is not necessary to aver a tender of money for the carriage, but it is sufficient to allege a readiness and wil-

CERTIORARI. 1073

lingness, and offer to pay. *Pickford v. The Grand Junction Railway Company*, 766

CASE.

See JUDGE'S CERTIFICATE, 7.
QUARTER SESSIONS.

CENTRAL CRIMINAL COURT.

The Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, s. 16, does not affect the removal of indictments from that Court into the Queen's Bench. Such removal is entirely regulated by the 5 & 6 Wm. 4, c. 33 (the certiorari act), and a defendant removing such indictment under the latter statute becomes liable in case of conviction to pay to the prosecutor the costs occasioned by such removal. *Regina v. Hawdon*, 1007

CERTIFICATE.

See ACKNOWLEDGMENT OF MARRIED WOMAN, 3.

CERTAINTY.

See PLEA, 14.

CERTIFICATE, (OF ARBITRATOR).

See ARBITRATION, 4.

CERTIFICATE (OF JUDGE).

See JUDGES' CERTIFICATE.
PLEAS, (SEVERAL). 3.

CERTIORARI.

See BRIGHTON COURT OF REQUESTS, 2, 3.

CENTRAL CRIMINAL COURT.
FALSE PRETENCE.

NOTICE TO JUSTICES, 1, 2, 3.

1. A notice of application for a writ of certiorari signed in the name of a solicitor, who describes himself "solicitor for the present churchwardens and overseers of Market Harborough" is sufficiently signed, pursuant to 13

Geo. 2, c. 18, s. 5. *Regina v. Solly and Another*, 115

2. A rule called on the prosecutor of a certiorari issued to remove an order of sessions confirming, without appeal, an order of justices, made pursuant to 55 Geo. 3, c. 68, s. 2, for stopping up a footpath, to shew cause why it should not be quashed, the recognizances required by 5 Geo. 2, c. 19, s. 2, not having been entered into, previous to the writ being issued; although they were entered into after the allowance: *Held*, that the statute only applied to cases where there was an appeal to the sessions, and not to cases where the order was confirmed without appeal; 2ndly, that the application should have been to quash the *allowance*, and not the *writ* itself; and the Court refused to mould the rule, so as to quash the *allowance*. *Regina v. Stephen Jones*, 504

CERTIFICATE (FOR COSTS).

See ARBITRATION, 18.

CHECK.

See NOTICE (OF DISHONOUR).

COGNOVIT.

See JUDGMENT NUNC PRO TUNC.

The witness to a cognovit, executed since the 1 & 2 Vict. c. 110, s. 3, must not only declare himself, in the attestation, to be the attorney from the party, but also that he subscribes his name as such. *Potter v. Nicholson*, 808

COLLUSION.

See PLEA, 7.

CONDITION.

See VARIANCE, 4, 5.

The plaintiff declared in assumpsit upon articles of partnership, entered into between him and the defendant,

by which the defendant undertook to pay to the credit of the concern 5000*l.*: the plaintiff undertook to pay 2000*l.* or thereabouts, and to make certain arrangements with regard to the premises in which the business was to be carried on: the agreement then provided, that if the plaintiff brought in less than 2000*l.*, the residue of that amount should be made up from the profits accruing due to him out of the business, that after the 2000*l.* had been so paid, a further sum of 3000*l.* should be paid by the plaintiff, either in money or by the deduction of one-third of his profits; that a license should be obtained by the plaintiff at his own expense: that the banker's account should be under the control of the defendant, as well as the employment of the clerks and servants, and the regulation of the general business accounts: The declaration then averred the plaintiff's readiness and willingness, well and truly to keep his part of the contract, and the performance of certain acts in pursuance of its provisions, but alleged that the defendant had not paid the 5000*l.* into the concern, in pursuance of the agreement. The defendant pleaded that the plaintiff had not procured the said license, and had not paid the 2000*l.* into the concern, at any time before the commencement of the suit.

Held ill on demurrer, and that the procurement of the license, and the payment of the 2000*l.* were not conditions precedent to the payment by the defendant of the 5000*l.*

Held also, on general demurrer, that it was sufficient for the plaintiff to aver his readiness and willingness to perform the contract, without an allegation of its actual performance. *Kemble v. Mills*, 446

CONSENT.

See ARBITRATION, 1.

NOTICE (TO JUSTICES), 4.

WARRANT OF ATTORNEY, 9.

COSTS.

CONSENT RULE.

See JUDGMENT AS IN CASE OF A
NONSUIT, 13.

CONSIDERATION.

See PLEAS, (SETTING ASIDE).
WARRANT OF ATTORNEY, 10.

CONSPIRACY.

See ATTORNEY, (RE-ADMISSION OF), 2.

CONSUL.

See ACKNOWLEDGMENT OF MARRIED
WOMAN, 1, 3.

CONTRACT.

See COUNTS, (SEVERAL).

CORONER'S INQUISITION.

If a coroner's jury should find a verdict of manslaughter the value of anything supposed to be moving to the death, may be found, so that it may afterwards be forfeited, if, on an indictment for the manslaughter, a conviction should follow. But an express finding of a deodand on an inquisition for manslaughter is bad, deodands being legal only in cases of death by misadventure. *The Queen v. Polworth*, 1048

COSTS.

See ARREST (WITHOUT PROBABLE
CAUSE).

ARBITRATION, 8.

JUDGE'S CERTIFICATE.

INTERPLEADER, 5.

PLEA (SEVERAL), 3.

1. The statute 3 & 4 Vict. c. 24, s. 2, applies to *all* actions of trespass, and trespass on the case; and the Court will not exclude from its operation a case, where only 1s. damages has been given, for an injury arising from defendant's negligence, appa-

COSTS, (INTERLOCUTORY). 1075

rently contrary to the justice of the case, the judge trying the cause having refused to certify. *Marriott v. Stanley*, 59

2. The 21 Jac. 1, c. 12, s. 5, applies to all constables; therefore, a constable appointed under the Municipal Corporation Act, is entitled on discontinuance, to double costs, under the former statute. *Maberly v. Pitterton*, 234

3. A suggestion is only necessary, when there would otherwise be an inconsistency on the record; and need not, therefore, be entered to give a party double costs, *Ib.*

4. To trespass quare clausum fregit, the defendant pleaded the general issue, and also special pleas of prescriptive rights; the plaintiff denied these rights, and new assigned excess. The defendant paid money into Court, upon the new assignment which the plaintiff accepted in satisfaction, and entered a nolle prosequi as to the other causes of action. *Held*, that the defendant was not entitled to the general costs of the cause. *Benn v. Bateman*, 743

COSTS, DOUBLE.

See COSTS, 2, 3.

COSTS OF THE CAUSE.

See COSTS, 4.

INTERPLEADER, 5.

COSTS, (OF THE DAY).

The Court will not grant a rule for the costs of the day, with a stay of proceedings. *Friden v. Bray*, 329

COSTS, (INTERLOCUTORY).

Where a defendant is taken in execution for the debt and costs recovered in an action, he is entitled to recover interlocutory costs in that action which have not been set off on taxation. *Beard v. M'Carthy*, 136

1076 COUNTS, (SEVERAL).

COUNSEL'S SIGNATURE.

See PLEA, 11.

COUNTY COURT.

An application to enter a suggestion on the roll under the Middlesex County Court Act, for costs, may be made as well in a case tried before the sheriff, as a case tried in one of the superior Courts. *Forbes v. Simmons*, 37

COUNTS, (SEVERAL).

See DISCONTINUANCE.

The plaintiff declared as secretary to the Commercial Steam Packet Company, and in the first count of his declaration alleged, that in consideration of the company supplying the defendant with a steam-vessel for hire, to go where he and his friends pleased, the defendant undertook and promised while the steam-vessel was so let to hire to him, that he would take due and proper care thereof, and not use the same in any illegal or unlawful manner, or for any illegal or unlawful purpose; yet the defendant disregarding his said promise, afterwards and whilst the said steam-vessel was so let to hire to him, did not take due and proper care, thereof, &c., but used the same for raising and levying war and insurrection and rebellion against the king of the French: The second count alleged that an agreement was entered into between the plaintiff and defendant, by which the former agreed to provide a steam-vessel for the use of the defendant, for one month, &c., and the latter agreed not to detain the same from him for more than one month; it then alleged that the steam-vessel having been supplied, the defendant detained the same for a long space of time, to wit, 100 days beyond the month, &c. *Held*, that those counts were not in

COVENANT.

violation of the rule of H. T., 4 Wm. 4, which provides that several counts shall not be allowed unless a distinct subject matter of complaint is intended to be established in respect of each. *Bleaden v. Rupallo*, 857

COURT OF REQUESTS.

See BRIGHTON COURT OF REQUESTS.

COVENANT.

1. The plaintiff declared in assumpsit, and the declaration recited a deed under seal, which had been entered into, for the performance of certain stipulated operations in chemistry, by the 21st of June, 1838, and which might be determined by the defendants, upon notice given in case of the non-fulfilment of the contract by that time, and alleged a subsequent parol agreement between the parties extending the time for completing the contract to the 21st of December, 1838, but it contained no statement of the determination of the deed. *Held*, upon demurrer, that the action was wrongly conceived in assumpsit upon the parol agreement, and that covenant should have been brought upon the original deed. *Gwynne v. Davy and Another*, 1

2. The plaintiff declared against the defendant as administratrix, upon a covenant under seal, entered into by the testator; the defendant pleaded that the testator had died insolvent, and then alleged a parol agreement with the plaintiff, upon the faith of which, she was induced to take out letters of administration to assign the deed to the plaintiff, the promise being that the plaintiff would not seek to charge her in that capacity; the plaintiff replied, taking issue upon the promise alleged in the plea. *Held*, that the plea was bad, as seeking to answer an agreement under seal, by a parol promise, and that at the trial of the cause, it was not to be taken as

CROWN.

alleging a deed under seal, but was proved by evidence of a parol agreement, and that proof being given, therefore, a verdict for the defendant was rightly entered. *Held*, also, however, that the plaintiff was entitled to judgment, non obstante veredicto. *Harris v. Goodwyn, Administratrix*, 409

3. The plaintiff declared in assumpsit upon a parol agreement, to which the defendant pleaded the general issue. On the trial, it appeared that a draft had been prepared, containing matters intended by the parties to form the subject of a deed; that alterations were made in it by both parties, and that at length a deed was drawn up in accordance with the terms of the agreement, and executed. *Held*, first, that there was no subsisting parol agreement; and, secondly, that the deed, being co-extensive with the supposed agreement, the plaintiff had conceived his action in assumpsit erroneously, and should have brought covenant. *Held*, also, that the defendant was entitled to set up the defence, that there was no parol agreement, under the plea of non assumpsit, although (per *Maule, J.*) had it been a case of merger of the agreement in the deed, that fact should have been specially pleaded. *Filmer v. Burnby*, 466

CRIM. CON.

See PROCEIN AMY, 1.

CRIMINAL INFORMATION.

In order to maintain an application for a criminal information, the party applying must leave himself wholly in the hands of the Court, and in no way whatever make libellous attacks on the other side. *Regina v. The Proprietors of the Nottingham Journal and Others*, 1042

CROWN.

See INTRUSION.

VENUE, 3.

WITNESS, 2.

DECLARATION. 1077

CUSTOMS.

See YARMOUTH, (CORPORATION OF).

DAMAGES.

See VENUE, 1.

A party took a house and fixtures which were valued as between outgoing and incoming tenant, and paid for them accordingly. Subsequently, he employed an auctioneer to sell the fixtures, but before the sale took place, they were seized by the sheriff under an execution against a former owner. The sheriff employed the same auctioneer to sell the fixtures, when they realized an amount far below the original valuation. *Held*, that in an action against the sheriff, the jury might give damages to the full amount of the original valuation. *Lockley v. Pye, Sheriff of Staffordshire*, 744

DEATH.

See JUDGMENT NUNC PRO TUNC.
POSTPONING TRIAL.
RELATION.

DEBT.

See DECLARATION, 6.

Debt lies upon a bill of exchange by an indorsee against his immediate indorser. *Watkins v. Wake*, 242

DECLARATION.

See TAXATION, 1.

1. In an action by a banking co-partnership, suing under the provisions of the 7 Geo. 4, the declaration commenced "W. C., manager of a certain joint stock society, &c. who has been duly named and appointed the nominal plaintiff." *Held*, sufficient, without alleging that he was named such manager, in pursuance of the act. *Christie v. Peart*, 291

2. In an action by indorsee against

acceptor of a bill, the declaration alleged that after the bill became due, the defendant promised to pay it "according to the tenor and effect of his said acceptance thereof." *Held*, on special demurrer, that this was, in effect, a promise to pay on request, and therefore sufficient, *Ib.*

3. The plaintiff declared against the secretary of an Insurance Company, and alleged the making and publishing of a prospectus, stating certain bonuses to have been declared by the rules of the Company, and that the secretary had represented that prospectus to contain a true account of the affairs of the Company; the declaration having alleged the breach of several of the rules appointed for the governance of the establishment, averred that the representations of the defendant were false and fraudulent, and that the plaintiff having been induced by those representations to effect a policy of insurance with the company, and to pay the premiums becoming due upon that policy, he had, by means thereof, been defrauded and deceived, in effecting the said policy, and in making the said payments thereon, and the said policy of insurance was of much less value to the plaintiff, than if the said representations of the defendant had been true in substance and in fact, to wit, 1000% of less value, and by means thereof, the plaintiff was likely to lose the whole benefit of his insurance, and the said sums of money so paid by him, as premiums for the same. *Held*, to disclose a sufficient cause of action. *Pontifex v. Bignold*, 860

4. To such a declaration, the defendant pleaded that the rules of the society had been and were so duly performed, &c., and the funds of the society had been and were so duly administered as was necessary for the maintenance and security of the said society, and of such insurances as had been effected. *Held*, ill, *Ib.*

DEMURRER (FRIVOLOUS.)

5. Although in an action in an inferior Court, it is necessary to allege in the declaration, that the cause of action arose within the jurisdiction, it is not requisite, when the cause is removed to the superior Court, by pone, that the same allegation shall be repeated. *Powell v. Ansell*, 893

6. Debt will not lie by the indorsee against the acceptor of a bill of exchange, *Ib.*

DECLARATION, (FILING.)

A plaintiff may *file* his declaration, and serve notice thereof on a defendant who is in custody at the suit of a third person, and is not bound to *deliver* his declaration. *Boucher v. Roe*, 329

DECLARATION, (NOTICE OF.)

See VARIANCE, 1.

DEED, (INSPECTION OF.)

See INSPECTION OF DEED.

DEFEASANCE.

See WARRANT OF ATTORNEY, 11.

DE INJURIA.

See REPLICATION, 1, 5, 12.

DELEGATE.

See ARBITRATION, 9, 22.

DEMURRER, (FRIVOLOUS.)

1. A count in debt stated that the defendant was indebted to the plaintiff "for goods sold to the defendant, by the plaintiff, at his request," the defendant having demurred specially, the Court set aside the demurrer as frivolous. *Delevene v. Percer*, 244

2. In assumpsit for goods sold and delivered, the defendant pleaded that the goods were, with the knowledge

and consent of the plaintiffs, sold to the defendant, by one H., being the agent of the plaintiffs in his own name, as the true owner, &c. Replication, that the goods were not, with the knowledge and consent of the plaintiffs, sold to the defendant by H., in his name, as the true owner, in manner and form, &c. Demurrer, on the ground, that the traverse was a negative pregnant and ambiguous: *Held*, that the demurrer was frivolous. *Pigeon and Others v. Osborne*, 511

3. A rule to set aside a demurrer to a replication as frivolous, must be drawn up on reading the plea as well as the subsequent pleadings in the cause. *Hamer v. Anderton*, 119

DEODAND.

See CORONER'S INQUISITION.

DEPONENT, (DESCRIPTION OF.)

See AFFIDAVIT, 1, 5.

DEPOSIT, (IN LIEU OF BAIL.)

1. Money having been paid into the hands of the Prothonotary of this Court, "in lieu of bail, to satisfy the costs in error," the Court refused to retain any portion of the amount so paid in, to satisfy a demand made by the adverse party, for costs incurred in the cause antecedently to the writ of error being obtained. *Gwynne v. Collins*, 70

2. If the defendant has paid money into Court, pursuant to 7 & 8 Geo. 4, c. 71, the Court will not superadd an application to take that money out to a motion for a rule for judgment as in case of a nonsuit, but a separate motion must be made for that purpose, after the latter has been disposed of. *Vale v. Gunter*, 106

3. If a defendant has deposited money in lieu of bail, and he after-

wards leaves the country, the Court will allow a rule nisi for taking the money out of Court to be served by sticking it up in the office. *Know v. Duncan*, 179

4. Money deposited in Court, in one action, pursuant to the 43 Geo. 3, c. 46, s. 2, and the 7 & 8 Geo. 4, c. 71, s. 2, cannot be paid out to an execution creditor in another action, in satisfaction of his claim, notwithstanding the provisions of the 1 & 2 Vict. c. 110, s. 12, as that section does not give power to seize money in execution while in the hands of a third person as trustee for the defendant. *France v. Campbell, Winter v. Campbell*, 914

5. Where a sum had been paid into Court, to abide the event of the suit pursuant to the 43 Geo. 3, c. 46, and the 7 & 8 Geo. 4, c. 71, and the cause and all matters in difference, being referred, a sum was awarded in favour of the plaintiff in the action, and as to the matters in difference, the Court made absolute a rule obtained by the plaintiff for obtaining payment out of Court of a part of the deposit in respect of the action, but refused, on disposing of that rule to direct the residue to be paid over to the defendant, but left him to make a separate application for that purpose. *Fowle v. Steinkeller*, 1037

DESCRIPTION (OF DEPONENT.)

See AFFIDAVIT, 1, 5.

DISCONTINUANCE.

See PLEA, 9.

In an action on a bill of exchange, with a count on an account stated, the defendant obtained a verdict on the first count, and the plaintiff on the last. A rule was obtained to set aside the verdict for the plaintiff on the last count, and for a new trial:

the Court allowed the plaintiff to discontinue, without payment of costs. *Lord Macclesfield v. Baddeley*, 312

DISHONOUR, (NOTICE OF.)

See NOTICE OF DISHONOUR.

DISMISSAL.

See BRIGHTON COURT OF REQUESTS, 4.

DISORDERLY HOUSE.

1. By the 39 Geo. 3, c. 79, certain places are declared to be disorderly within the meaning of the 36 Geo. 3, c. 8, and a penalty is attached to certain offences committed in those places. Those offences are still punishable under the former act, although the latter was only passed for a limited period. *Ex parte Higginbotham*, 200

2. The 2 & 3 Vict. which requires certain proceedings to be prosecuted in the name of the attorney or solicitor general only applies to penalties for publishing printed papers, not having the printer's name, &c., attached, and not to offences under 36 Geo. 3, c. 8, and 39 Geo. 3, c. 79, *Ib.*

DISTRINGAS.

1. The affidavit in support of an application for a distringas, stated the requisite number of calls and appointments to have been made, but set forth that at the second call, the deponent was informed that the defendant had been away from home for five weeks, and also, that upon inquiry in the neighbourhood, he had learned the same fact, as well as that the defendant was believed to be out of the way, to avoid service of a writ of execution in another action: The Court granted the distringas, although it was possible, that from the length of time during which the defendant had been absent, he had not heard of the proceedings. *Archer v. Brindley*, 38

DISTRINGAS.

2. Where a party moves to discharge a rule obtained for a distringas to compel appearance, he should bring before the Court the affidavits upon which that rule was granted. *Cooper v. Folkes*, 46

3. An affidavit, in support of a motion for a distringas, stated that the defendant could not be found: that the defendant was partner with another person, joined with him in the action; that the defendant's residence was unknown, but that communications had been had with his partner, at their counting-house, in the course of which the latter stated, that the defendant "was in England:" the affidavit, however, contained no statement of an inquiry having been made as to where the defendant was, and the Court refused to grant the application. *Greenwood v. Selden and Another*, 72

4. In applying for a writ of distringas, it is not indispensably necessary that it should be sworn to be believed, that the defendant is keeping out of the way to avoid being served, if the facts disclosed in the affidavit, shew that the defendant is so doing. *Channing v. Cross*, 118

5. Where a defendant, by fastening up his house prevents the sheriff from executing a writ of distringas, the Court will allow the plaintiff to enter an appearance for him, although the defendant is known to be within the house. *Whishaw v. Brown*, 123

6. A sheriff's return of non est inventus, and nulla bona, to a writ of distringas is not sufficient, but an affidavit must be produced by the sheriff's officer, stating what efforts had been made to execute the writ. *Waite v. Cook*, 139

7. Where a copy of distringas, in the teste of which, the date was omitted, was served on the 28th of August, it was held to be too late to take advantage of the omission on the 10th of November. *Quilters v. Neely*, 139

8. The Court refused a distringas where upon the second application, the answer was, that "the defendant was on his way to Scotland," and on the third, that "he was gone to Calais," it not appearing that those answers were untrue. *Beverley v. Christie*, 293

9. Where the sheriff returns non est inventus and nulla bona to a writ of distringas, and the defendant's wife on the premises informs the sheriff's officer, that she and her husband are living in furnished lodgings, and have nothing there or elsewhere, on which to execute the writ, the Court will allow an appearance to be entered for the defendant. *Thomson v. Furney*, 344

10. Where appointments are made for the purpose of obtaining a distringas, it is necessary that the hour should be mentioned, although there may be some reason to believe that the defendant is keeping out of the way. *Newman v. Hickman*, 546

11. If a writ of summons has issued, and suitable efforts have been made to serve it during the four months, which the Uniformity of Process Act provides, that it shall be in force, it is no objection to a writ of distringas founded on the summons, that it issued after the expiration of that writ. *Bromage v. Ray*, 559

12. A writ of summons expired on the 5th of October, and on the 5th of December, an alias issued. The plaintiff having made several ineffectual attempts to serve this latter writ, obtained a distringas which required the appearance to be entered to the first writ: *Held*, that the proceedings were regular. *Pearce v. Swain*, 724

13. The Court will not grant a distringas, for the purpose of outlawry, where attempts to serve the summons at the defendant's last place of residence have not been made, although it is unknown, if no attempts have been made to discover it. *Nugae v. Swinford*, 1038

DOCUMENT (INSPECTION OF).

See JUDGE'S POWER, 2.

DOCUMENT, (ORIGINAL).

See ORIGINAL DOCUMENT.

DOCUMENT, (PUBLIC).

See PUBLIC DOCUMENT.

DRAWER.

See REPLICATION, 1, 10.

ECCLESIASTICAL JURISDICTION.

See PROHIBITION.

EJECTMENT.

See AMENDMENT, 3, 5.

STAYING PROCEEDINGS.

SECURITY FOR COSTS, 6.

WITNESS, 5.

1. A declaration in ejectment, being entitled as of "Trinity Term, in the fourth year of the reign of Queen Victoria," instead of the "third year:" *Held*, irregular, and the Court refused to allow judgment against the casual ejector to be signed, although it was sworn that service was effected on the 29th of October, with notice to appear in the "next" Michaelmas Term. *Doe dem. Vincent v. Roe*, 43

2. On an application for judgment against the casual ejector, it appeared that the declaration was wrongly entitled of Michaelmas Term, 1840, with notice to appear in the "next Michaelmas Term." The declaration was served before the commencement of the Term, and the tenant then said that he knew that no step could be taken until the following March: the Court refused to grant the rule. *Doe dem. Channell v. Roe*, 67

3. Service on the daughter of the tenant in possession with an acknowledgment by the wife before the term that the declaration has come to the

hands of her husband is sufficient for a rule nisi for judgment against the casual ejector. *Doe d. Chaffey v. Roe*, 100

4. A declaration in ejectment being entitled of T. T., 4 Vict. such Term not having arrived, and no date being affixed to the notice at the foot of the declaration, the Court refused to grant a rule for judgment against the casual ejector. *Doe dem. Newman v. Roe*, 131

5. Service of a declaration in ejectment on a servant of the tenant on the premises, is insufficient, although the deponent serving it, subsequently converses with the tenant, and explains the nature of the declaration. *Doe d. Ginger v. Roe*, 336

6. A notice at the foot of a declaration in ejectment, directed to "R. Newton," and served on "R. A. Newton" is sufficient, if it is sworn that the latter is the person intended. *Doe dem. Smart v. Roe*, 340

7. If a declaration in ejectment, is intituled "Hilary Term, 4 Vict." but the notice at the foot, which is dated the 7th of January, 1841, requires the tenant to appear in the *next* Term, it is sufficient. *Doe dem. Brook v. Roe*, 347

8. If the name of a tenant in possession has been introduced into a declaration of ejectment, instead of "Richard Roe," it is sufficient service to obtain a rule nisi for judgment. *Doe dem. Dickinson v. Roe*, 363

9. Where the party interested in premises has become bankrupt, service on his assignees and the messenger in possession under the fiat, is sufficient to obtain a rule for judgment against the casual ejector. *Doe dem. Chadwick v. Roe*, 492

10. On an application for judgment against the casual ejector, where proceedings under the 4 Geo. 2, c. 28, have been taken, it is not sufficient to shew that there is no sufficient distress "to countervail the arrears of

rent," if more than half-a-year's rent is sworn to be due. *Doe dem. Powell v. Roe*, 548

11. Where a party is served as tenant in possession, and he swears that he is under lessee of the premises sought to be recovered, the Court will not set aside an appearance entered by him on a suggestion by the lessor of the plaintiff, that the tenant has no interest in the premises. *Deo dem. Turner v. Gee*, 612

12. Where a notice at the foot of a declaration in ejectment required an appearance in Michaelmas Term, but service could not be effected in time to move in that Term, the Court, in Hilary Term, granted a rule for judgment against the casual ejector, unless cause was shewn before the last day but one of that Term. *Doe d. The Earl of Warwick v. Roe*, 714

13. Service in ejectment upon a lunatic tenant is good service, on which to obtain judgment against the casual ejector. After repeated attempts to serve the tenant in possession, a copy of the declaration was left at his house on the day before Term. On the first day of Term a letter was received from his attorney, dated the preceding day, acknowledging the receipt of the copy of the declaration: *Held*, sufficient to raise a presumption that it had reached the hands of the defendant on the day before Term. *Doe dem. Gibbard v. Roe*, 844

14. The Court granted a rule nisi for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear in the "Common Bench," instead of the "Queen's Bench:" the declaration being entitled in the "Queen's Bench." *Doe d. Evans v. Roe*, 999

15. If a tenant in possession is a foreigner, not understanding English, the object of the declaration and notice in ejectment may be explained

EVIDENCE.

through the medium of an interpreter.
Doe d. Cuttell v. Roe, 1023

16. Service on the acting partner of a firm in possession of premises sought to be recovered, is sufficient.
Doe d. Overton v. Roe, 1039

ELECTION.

See NONSUIT.

ELEGIT.

An execution creditor under an *elegit*, is not entitled to rent which became due between the time of the delivery of the writ to the sheriff, and the taking of the inquisition. *Sharp v. Key*, 770

ERASURE.

See AFFIDAVIT, 4.

ERROR.

See DEPOSIT IN LIEU OF BAIL, 1.

Bail in error is not necessary, when the writ is of error, *coram nobis*; as it is not a supersedeas of execution, but the plaintiff may apply to the Court for leave to take out execution, which will be granted according to circumstances. *Knight v. Thynne*, 984

ESCAPE.

See PLEA, 6.
SHERIFF, 3.

ESTOPPEL.

See PLEA, 8.

EVIDENCE.

See INSOLVENT, 2.
NOTICE TO PRODUCE.
PLEA, 15.
PUBLIC DOCUMENT.
STAYING PROCEEDINGS.
SURPRISE, 2.

FEIGNED ISSUE. 1083

VARIANCE, 2, 3, 4, 5, 6.
VENUE, 1.
WITNESS, 1.

EXCESS OF AUTHORITY.

See ARBITRATION, 14.

EXECUTION.

See BANKRUPT, 4.
ERROR.
PLEA, 8.
REMOVAL OF PROCEEDINGS.

EXECUTION CREDITOR.

See ELEGIT.
SHERIFF 5.

FACULTY.

See PROHIBITION, 2.

FALSE PRETENCE.

The *certiorari* in all indictments for obtaining money by any false pretence, is taken away by 7 & 8 Geo. 4, c. 29, s. 53. *Regina v. Butcher*, 135

FEIGNED ISSUE.

See INTERPLEADER, 5.

1. A feigned issue under the Interpleader Act, directed the following questions to be tried between the assignees of a bankrupt, and the execution creditors, at whose suit certain goods of the bankrupt had been seized; *viz.* "If, at the time of the seizing and levying of the said goods, &c., the plaintiffs were entitled to the same as against and free from the said execution; and if the said goods, &c. were not subject to be so seized and levied under the said writ as against the plaintiffs." *Held*, that that issue raised the question, not only as to notice of the act of bankruptcy, but the plaintiffs title as assignees. *Lott and Another, Assignees of Smart, a Bankrupt v. Melville and Another*, 882

2. The 90th section of the 6 Geo. 4, c. 16, requiring that in any action by any assignee acting under a commission of bankrupt, notice shall be given of those matters connected with the commission, which are intended to be disputed by the defendant, does not apply to such an issue, *Ib.*

FINALITY.

See ARBITRATION, 7, 16.

FOOTPATH, (STOPPING).

See CERTIORARI, 2.

FOREIGNER.

See EJECTMENT, 15.

FOREIGN JUDGMENT.

See SCOTCH DECREE.

FRAUD.

See PLEA, 7.
SURPRISE, 1.

FRIVOLOUS DEMURRER.

See DEMURRER (FRIVOLOUS).

GAMING.

See PLEA, (SEVERAL) 1.
REPLICATION, 1.

GENERAL ISSUE.

See PLEA, 16.

GOOD FAITH.

1. Where a judge in vacation, made an order for a stay of proceedings, on the ground that they were brought against good faith; a motion on the last day of the ensuing Term to rescind that order, was held not too late. *Cocker v. Tempest*, 306

2. The Court has unlimited power over its own process, and may stay proceedings brought against good

HUSBAND'S CONSENT.

faith, though the agreement was made whilst the parties were not under the authority of the Court. *Ib.*

GUARANTEE.

See PLEA, 4.
VARIANCE, 2, 4.

GUARDIAN.

See PROCHEIN AMY.

HABEAS CORPUS.

See SMUGGLING.
WARRANT.

Where a defendant seeks to be discharged out of custody, on the ground that the warrant of commitment, on which he is detained, is illegal, he must be brought before the Court, by a writ of habeas corpus, although it is sworn that he is too poor to bear the expense, as the validity of the warrant will not be discussed in his absence. *Ex parte Martins*, 194

HUSBAND'S CONSENT.

See ACKNOWLEDGMENT BY MARRIED WOMAN.
HUSBAND AND WIFE.

In support of an application for an order to dispense with the concurrence of the husband of a married woman to the deeds of conveyance of certain property, under the 3 & 4 Wm. 4, c. 74, s. 91, it was sworn that the husband had absconded from home, and had since sailed for Port Philip; that since the departure of the ship, his wife had heard nothing of him, and that she believed him to be on his said voyage; that her husband had been made a bankrupt, and that her interest in the property in question passed to his assignees, and, also, that her husband, having sold the property, she was desirous of completing the conveyance. *Held*, sufficient. *Ex parte Susan Stone*, 843

INFERIOR COURT.

HUSBAND AND WIFE.

See ACKNOWLEDGMENT BY A MARRIED WOMAN.
ARBITRATION, 19.

IDENTITY.

See NOTICE TO JUSTICES, 3.

ILLEGALITY.

See WARRANT OF ATTORNEY, 4.

INCOMPETENCY OF WITNESS.

See TAXATION, 6.
WITNESS, 1.

INDIA.

See WITNESS, 2.

INDICTMENT, (QUASHING).

Where an indictment at common law for disobeying an order of sessions, made pursuant to 4 & 5 Wm. 4, c. 76, ss. 72, 73, for the maintenance of a bastard child, was defective, but only on points which would render it bad on demurrer, the Court refused to interfere by quashing it. *Regina v. Taylor*, 600

INDORSEE.

See DEBT.
DECLARATION, 2, 6.
REPLICATION, 10, 12.

INDORSER.

See DEBT,
DECLARATION, 2, 6.
REPLICATION, 10, 12.

INFANT.

See ARTICLED CLERK, 2, 5.
PROCHEIN AMY.
SECURITY FOR COSTS, 4.

INFERIOR COURT.

See DECLARATION, 5.

INSURANCE COMPANY. 1085

INSOLVENT.

See JUDGMENT AS IN CASE OF A NON-SUIT, 1, 4, 11, 12.
SECURITY FOR COSTS, 1.
WARRANT OF ATTORNEY, 10.

1. The defendant having been discharged under the Insolvent Act, as to a debt due to the plaintiff, afterwards gave the plaintiff a bond for a new debt, and included in it the sum for which he was discharged. The bond having been put in suit, the defendant suffered judgment by default, and was taken in execution: *Held*, that he was not entitled to be discharged out of custody, for, the bond was, at all events, good, as to the new debt: and *Semble*, per *Parke*, B., that the defendant, having neglected to plead his discharge, as to the old debt, was liable to be taken in execution for that amount also. *Deane v. Knott*, 224

2. The assignment made by an insolvent debtor on filing his petition under the 7 Geo. 4, c. 57, ss. 10 and 40, so fully vests his property in his assignees that a statement subsequently made by him in his schedule will not be admissible in evidence to impeach the title of the assignees to the property assigned. *Elverd v. Foster*, 922

INSPECTION, (OF DEED.)

The Court will not order a party to permit his opponent in the cause to inspect and take a copy of a deed of conveyance, with a view only to the discussion of a rule for a new trial. *Wood v. Morewood*, 669

INSPECTION OF DOCUMENT.

See JUDGE'S POWER, 2.

INSURANCE COMPANY.

See DECLARATION, 3, 4.

INTEREST.

See STAMP, 1.

The time of "entering up judgment," referred to by the 1 & 2 Vict. c. 110, s. 17, is, that at which *incipitur* is entered in the Master's book; therefore, where the *incipitur* was entered on the 8th of January, in pursuance of the Master's allocatur, for 630*l.*, but upon subsequent application by the plaintiff, for a review of the taxation of costs, the amount was increased to 643*l.*, by which sum the judgment was amended on the 30th May, the date of the judgment being left unaltered; *Held*, that the plaintiff was entitled to interest from the 8th of January, and not from the 30th of May only. *Fisher v. Dudding*, 872

INTERPLEADER.

See FEIGNED ISSUE.

1. Actions were commenced by two persons, claiming to be the lawful owners of a bill of exchange, against the acceptor. The Court directed an issue to try who was lawfully entitled to recover on the bill, and relieved the acceptor from all claim in respect of costs. *Regan v. Serle and Another*, 193

2. A sheriff having levied on the goods of the defendant, received notice of his bankruptcy, and of a claim by the provisional assignee, "or of any other persons who might be appointed as assignees." After the assignees were appointed, the sheriff obtained an interpleader rule, calling on the provisional assignee only to appear. *Held*, per Rolfe, B., that the assignees were entitled to appear on that rule. *Ibbotson v. Chandler*, 250

3. Where an application has been made to a judge at chambers, under the 1 & 2 Wm. 4, c. 58, s. 6, and the 1 & 2 Vict. c. 45, s. 2, the Interpleader Acts, and the parties do not go before the judge at the instance of the execution creditor, and he, having

INTERROGATORIES.

made inquiries, abandons his execution, the Court will not grant summarily to the claimant, the costs of attending at the judge's Chambers, but will leave him to his action.

Swaine v. Stephen Spencer, 347

4. Where an issue has been directed under the Interpleader Act, to try the right to a bill of exchange, the bonâ fide owner of it is entitled to the amount of the bill, and all costs from the wrongful claimant, so as completely to indemnify himself. *Jones v. Regan*, 580

5. A feigned issue having been directed under the Interpleader Act, to be tried in respect of five horses, seized under a fi. fa. issued at the suit of L. against H., in which L. was defendant, and T., the claimant, was plaintiff, the jury found that T. was entitled to two of the horses, and L. to the remaining three; T. thereupon applied to the Court for the general costs of the trial, and also of taking so much of the produce of the sale of the horses to which he had been declared to be entitled out of Court, and of the original motion: The Court directed that the Master should inquire into the amount of costs incurred by each party with regard to his respective claim, and should balance one against the other, and that the party in whose favour the balance arose should be entitled to the amount thereof from the other: they also directed that L., the defendant in the issue, should pay the costs of the original applications to the Court for the issue; but as the claimant had asked too much in claiming the general costs of the cause, they refused to order the costs of the motion to be paid to him. *Lewis v. Holding*, 652

INTERPRETER.

See EJECTMENT, 15.

FEIGNED ISSUE, 1.

INTERROGATORIES.

See WITNESS, 3, 4.

IRREGULARITY.

ISSUES, (SEVERAL).

See ARBITRATION, 23.

INTRUSION.

The 4 Anne, c. 15, (as to pleading double,) does not bind the Crown, therefore, in an information for intrusion, the Court has no power to compel the Attorney General to allow the defendant to plead several matters. *The Attorney General v. Donaldson and Others*, 319

IRREGULARITY.

See AFFIDAVIT, 6.

POWER OF COURT.

SUMMONS, 2.

WAIVER, 1.

1. A motion to set aside the copy of a writ of summons, on the ground of irregularity, is informal. *Kenny v. Bishop*, 57

2. Where a defendant by his attorney entered an appearance, and the plaintiff afterwards entered one for him; filed a declaration, and served notice on the defendant in the country; the Court held that the objection to the plaintiff's proceedings made them irregular, and not null, and, therefore, the defendant was bound to come promptly to the Court, after the notice of declaration was served on him, as that gave him sufficient notice of the plaintiff's proceedings. *Alsager v. Crisp*, 353

3. Where a levy was made on the goods of the accommodation acceptor of a bill of exchange on the 15th of February, it was held too late to apply on the third day of the following Easter Term, to set aside those proceedings on the ground of no process having been served on the defendant, as the plaintiff's proceedings were irregular, and not null. *Holmes v. Russel*, 487

4. The omission to sue out an original writ of *capias ad satisfaciendum*, previous to issuing a writ of

JUDGE'S CERTIFICATE. 1087

testatum capias ad satisfaciendum, is a mere irregularity, which is unavailable to the defendant, after a lapse of six years. *Warne v. Haddon*, 960

ISSUE.

It is too late to object that the date of the writ is mis-described in the issue, after a delay from the 13th of March to the 16th of April, although during that period, the defendant, who was not an attorney, conducted his defence in person. *Currey and Another v. Bowker*, 523

ISSUE MATERIAL.

See PLEA (STRIKING OUT).

JOINT STOCK COMPANY.

See DECLARATION, 1.

PLEA, 7.

JUDGE'S CERTIFICATE.

See COSTS, 1.

PLEAS (SEVERAL), 3.

1. In an action for a nuisance, the plaintiff alleged that he was possessed of a certain messuage, and that the defendant being possessed of a certain mill and workshop, so wrongfully used certain engines, funnels, chimneys, and manufactories, as that a noise, smoke, and deleterious dust came therefrom, and injured the plaintiff's house, and made it uninhabitable; the defendant pleaded not guilty: *Held*, that the action was brought to try a right beyond the mere right to recover damages, and was within the principle of the second section of the 3 & 4 Vict. c. 24, and that *1s.* damages only having been given by the jury, the judge was empowered to certify, to give the plaintiff his costs. *Shuttleworth v. Cocker*, 76

2. *Semble*, that such a certificate should be granted immediately, on the termination of the trial. *Ib.*

3. A judge having so granted a cer-

1088 JUDGE'S CERTIFICATE.

tificate, and ordered an entry to be made on the back of the record, and an insufficient entry having been made and signed by him, he may nevertheless subsequently alter and amend the entry, the erroneous indorsement being considered a misprision or mistake of the clerk of the Court, *Ib.*

4. In an action for infringing a patent, the judge certified under the 5 & 6 Wm. 4, c. 83, s. 3, that the validity of the patent came in question. In a subsequent action between the same parties, the plaintiff obtained a verdict, with one 1s. damages, and the certificate was given in evidence, in order to obtain treble costs. Ten days before the trial of the latter action the 3 & 4 Vict. c. 24, came into operation, but no application was made to the judge to certify under that act: *Held*, that the plaintiff was not entitled to any costs. *Gillett v. Green*, 219

5. A certificate under the 3 & 4 Vict. c. 24, must be given *immediately* after the trial: *Semble*, even before another cause is called on, *Ib.*

6. In an action of trespass tried on the 27th of June, 1840, the plaintiff obtained a verdict, with 1s. damages, leave being reserved for the defendant to move to enter a nonsuit, the judge having been applied to, to certify under the 43 Eliz. c. 6, s. 2, declined to do so, until the motion for a nonsuit should have been disposed of. On the 3rd of July following, the 3 & 4 Vict. c. 24, came into operation. The motion for a nonsuit was not made, and on the 9th of November, the judge certified: *Held*, that the certificate was null and void. *Morgan (an Infant, by his next friend) v. Thorne*, 226

7. In an action on the case, the declaration was by the proprietor of certain medicines, against a person for selling medicines, prepared by the defendant, as and for, and falsely representing them to be prepared by the plaintiffs: *Held*, an action in which a

JUDGE'S POWER.

question of right might arise, besides the mere right to recover damages, and in which, therefore, the judge at the trial was authorized to grant a certificate under the 3 & 4 Vict. c. 24.

Per Maule, J.—If an action be really brought to try a right, whether it is fitted for that purpose or not, the case is within the act, and a certificate may be granted by the judge. *Morison and Others v. Salmon*, 387

8. The 3 & 4 Vict. c. 24, s. 2, which deprives the plaintiff of costs where, in certain actions less damages than 40s. are given, "unless the judge shall immediately afterwards certify that the action was brought to try a right, &c." is to be construed as meaning that the judge is to certify within a reasonable time upon the facts as they appear at the trial, without being influenced by any extraneous matter, afterwards presented to his notice, therefore, where at the assizes, the jury returned a verdict for 1s. in a cause which stood last in the list, and the judge adjourned the Court to his lodgings, whither the plaintiff's counsel followed, and asked for a certificate, which was granted. *Held*, that the certificate was given within a sufficient time. *Thompson v. Gibson and Another*, 717

9. The words "immediately afterwards" in the 3 & 4 Vict. c. 24, s. 2. by which a plaintiff is deprived of costs, (if in certain actions he recovers less than 40s. damages,) mean within a reasonable time after the trial. *Page v. Pearce*, 815

JUDGE'S NOTES.

See JUDGE'S POWER, 1.

JUDGE'S ORDER.

See WARRANT OF ATTORNEY, 9.

JUDGE'S POWER.

1. Where a party complains of an erroneous entry of the verdict by the Associate, the proper course is to apply

to the judge who tried the cause, to correct the entry by his notes. Where such an application has been made and the judge has refused to make any order, the Court will not entertain a motion to review his decision. *Newton and Wife v. Harland and Another*, 65

2. Where a judge at Chambers had made an order upon the plaintiffs to permit the defendant to inspect and take a copy of a promissory note upon which the action was brought, the Court refused to grant a rule to rescind that order, although it was sworn that no special grounds were stated at Chambers upon which the order was founded. *Woolner and Another v. Devereux*. 67

JUDGMENT.

See INTEREST.

ORDER OF COURT.

JUDGMENT AS IN CASE OF NONSUIT. •

See DEPOSIT IN LIEU OF BAIL, 2.

1. Where a plaintiff seeks to discharge a rule for judgment as in case of a nonsuit, offering a stet processus, upon the ground that the defendant is insolvent, it ought to appear clearly from his affidavit that he was not aware of the defendant's insolvency, before the commencement of the suit. *Smith v. Davis*, 50

2. A rule absolute for judgment as in case of a nonsuit having been obtained, a motion was made, calling upon the defendant to shew cause, why that rule should not be discharged, upon the ground of its having been moved, contrary to an alleged understanding between the plaintiff's attorney, and the defendant's counsel, at a conversation which took place upon their accidentally meeting in the street. The Court refused, upon that ground, to discharge the rule, and to set aside judgment as in case of a

nonsuit signed pursuant to it. *Richardson v. Peto*, 73

3. A rule for judgment as in case of a nonsuit, cannot be drawn up with a stay of proceedings. *Archer v. Smith*, 99

4. Where a plaintiff has not proceeded to trial pursuant to his notice, if he sets up the insolvency of the defendant as an excuse for the default, he ought to shew, by his affidavit, in terms, that the insolvency of the defendant was really his reason for not proceeding to trial. *Wainwright v. Gibson*, 100

5. It is a sufficient answer to a rule for judgment as in case of a nonsuit, that the debt and costs have been paid after issue joined, and before the rule was obtained, although the payment has been made without the knowledge of the defendant's attorney. *Elias v. Elias*, 104

6. In a country cause issue was joined on the day before Trinity Term, and no notice of trial was given. *Held*, that a motion for judgment as in case of a nonsuit, in the following Hilary Term, was premature. *Downes v. Bostock*, 241

7. If a defendant's attorney, improperly obtains possession of a document from a servant of the plaintiff, and which is essential to his case, it is sufficient excuse for not proceeding to trial, pursuant to notice. *Cocker v. Shuttleworth*, 321

8. Where negotiations for the settlement of an action have proceeded, until it is too late for a plaintiff to give notice of trial, according to the practice of the Court, and the defendant obtains a rule for judgment as in case of a nonsuit, the Court will discharge the rule with costs. *Alford v. Fellowes*, 326

9. On discharging a rule for judgment as in case of a nonsuit, on a peremptory undertaking, the Court will not impose the term of the plaintiff's giving security for costs, on the ground

1090 JUDGMENT, (SIGNING).

of his having made an assignment of his property for the benefit of his creditors, previous to the commencement of the action. *Solomon v. Leek*, 361

10. Where the plaintiff proceeded against the defendant, both at law and in equity, but elected to proceed in the Court of Chancery, default having been made, the defendant was held to be entitled to judgment as in case of a nonsuit. *Johnstone v. Pring*, 395

11. In order to discharge a rule for judgment as in case of a nonsuit, on the ground of the defendant's insolvency, it must appear on the plaintiff's affidavit, that the knowledge of the insolvency reached the plaintiff since the last step taken by him towards bringing the case to trial. *Fisher v. Lediard*, 545

12. In order to render the insolvency of a defendant a valid ground for not proceeding to trial, it must be shewn that the knowledge of that fact did not come to the plaintiff before the last step taken by him in the cause. *Topping v. Brown*, 582

13. Judgment as in case of a nonsuit, may be obtained in an ejectment, if issue has been joined, although through the default of the lessor of the plaintiff, no consent rule has been actually drawn up, the tenant in possession having appeared and pleaded. *Doe d. Williams v. Smith*, 1011

JUDGMENT NUNC PRO TUNC.

Where an instalment on a cognovit became due, after the death of a defendant, the Court refused to allow judgment to be entered up on the cognovit nunc pro tunc. *Blackburn v. Godrick*, 337

JUDGMENT RECOVERED.

See STAYING PROCEEDINGS, 2.

JUDGMENT, (SIGNING).

Where it is questionable whether

LACHES.

sufficient notice has been given to the defendant of a declaration having been filed, the plaintiff must sign judgment for want of a plea at his own peril, and the Court will not assist, by giving him leave to take such a proceeding. *Spriggings v. White*, 1000

JUDICIAL NOTICE.

See ARBITRATION, 5.

WARRANT OF ATTORNEY, 13.

Judicial notice will not be taken by the Court that a particular street is not in a certain county, although it may be generally known to be situated in another. *Humphreys v. Budd*, 1000

JURAT.

See AFFIDAVIT, 4, 6.

SMALL DEBTOR, 2.

JURISDICTION, (OF JUSTICES).

The 4 & 5 Wm. 4, c. 51, requires that a summons to appear before justices, and answer a summons under the statute, shall be served ten days "at least" before the hearing. A party was summoned on the 20th day of the month to appear on the 30th, and was convicted for default of appearance. *Held*, that the justices had no jurisdiction, as the ten days must be reckoned exclusive of the day of serving the summons, and that of convicting the defendant. *Mitchell v. Foster*, 527

JURISDICTION, (OF SHERIFF).

See WRIT OF TRIAL, 2.

JUSTICES, (JURISDICTION OF).

See JURISDICTION OF JUSTICES.

LACHES.

See AFFIDAVIT, (FILING).

MAGISTRATE.

See ARBITRATION, 15.
DISTRINGAS, 7.
GOOD FAITH, 1.
IRREGULARITY, 3, 4.
ISSUE.
NOTICE TO QUIT.
PRISONER.
SCIRE FACIAS.
SHERIFF'S RETURN, 3.
WAIVER.
WRIT OF TRIAL, 2.

LANDLORD AND TENANT.

See VIDELICET.

In an order by magistrates, under 11 Geo. 2, c. 19, s. 4, it is necessary that the offence should be charged to have been committed "wilfully and knowingly." *Regina v. The Justices of Radnorshire*, 90

LIBEL.

See CRIMINAL INFORMATION.

LIBERUM TENEMENTUM.

See PLEA, 3.

LIMITATIONS, (STATUTE OF).

See STATUTE OF LIMITATIONS.

LOTTERY.

Proceedings for the recovery of penalties relating to lotteries, contrary to the 42 Geo. 3, c. 119, must, since the 46 Geo. 3, c. 48, s. 59, be sued for in the name of the Attorney General, and not before magistrates, whether the lotteries are private or state lotteries. *Regina v. Tuddenham*, 937

LUNATIC.

See ARTICLED CLERK, 4.
EJECTMENT, 13.

MAGISTRATE.

See LANDLORD AND TENANT.

MERCHANT'S ACCOUNTS. 1091

MANDAMUS.

See APPEAL, (HEARING).
BASTARD, 5.
QUARTER SESSIONS.
RAILWAY.
SECURITY FOR COSTS, 2.
WITNESS, 2.

In a case in which, by agreement, between the parties, an application was made for a mandamus, merely with a view to obtain the opinion of the Court whether on the construction of a private act, the proceeding by mandamus was the proper one, the Court stopped the argument, and refused to give any decision. *Regina v. The Directors of the Blackway Railway*, 558

MANSLAUGHTER.

See CORONER'S INQUISITION.

MARKSWOMAN.

See SMALL DEBTOR, 2.

MARRIED WOMAN.

See ACKNOWLEDGMENT BY MARRIED WOMAN.

MARSHAL.

See PLEA, 6.

MASTER'S DISCRETION.

See TAXATION, 1, 4, 6, 7.

MATERIAL ISSUE.

See PLEA, (STRIKING OUT).

MEMBER OF PARLIAMENT.

See OUTLAWRY.

MERCHANT'S ACCOUNTS.

See STATUTE OF LIMITATIONS.

MERITS.

See BRIGHTON COURT OF REQUESTS, 4.
NEW TRIAL, 3.

MESNE PROFITS,

See VIDELICET.

MESSENGER.

See EJECTMENT, 9.

MISADVENTURE.

See CORONER'S INQUISITION.

MISPRISION (OF CLERK.)

See JUDGE'S CERTIFICATE, 3.

MORTGAGOR AND MORTGAGEE.

See RELATION.

MUNICIPAL CORPORATION ACT.

See COSTS, 3.

NEGATIVE PREGNANT.

See DEMURRER, (FRIVOLOUS,) 2.
PLEA, 5.

NEW ASSIGNMENT.

See COSTS, 4.

NEW TRIAL.

See SPECIAL CASE.

1. The fact of the person acting as deputy for the sheriff, being attorney for the defendant, is not a ground for obtaining a new trial. *Briggs v. Sowton*, 105

2. An application for a new trial in a cause tried on a writ of trial, in Vacation, must be made within the first four days of the following term, and if the notes of the trial cannot be procured, an application must be made within the four days, for further time to make the application. *Williams v. Andrews*, 122

NONSUIT.

3. Where the lessor of the plaintiff in ejectment has been nonsuited at the trial, in default of the defendant's appearance to confess lease, entry, and ouster, the latter may have a new trial on the merits, on payment of costs as between party and party, and not as between attorney and client. *Doe dem. Cooling v. Appleby*, 556

4. Where a cause has been tried before the under sheriff, and a new trial is directed, it may be made part of the rule for that purpose, that the cause should be tried before the superior Court, and a separate application for that purpose is not necessary. *Moggeridge v. Drew*, 1042

NOLLE PROSEQUI.

See COSTS, 4.

NOMINAL PLAINTIFF.

See DECLARATION, 1.

NON ASSUMPSIT.

See PLEA, 13.

NUNQUAM INDEBITATUS.

See PLEA, 9.

NON OBSTANTE VEREDICTO.

See COVENANT, 2.
PLEA, 15.

NON PROS.

Judgment of non pros for not declaring cannot be signed before the end of the Term next after an appearance is entered. *Foster v. Pryme*, 749

NONSUIT.

Where a plaintiff of his own accord, elects to be nonsuited, he cannot afterwards move to set aside that nonsuit. *Barnes and Others v. Whiteman*, 181

NOTICE (TO QUIT.)

NOT GUILTY.

See PLEA, 16, 17.

NOTES OF JUDGE.

See JUDGE'S POWER, 1.

NOTICE.

See CERTIORARI, 1.
PLEA, 4.

NOTICE (OF DECLARATION.)

See VARIANCE, 1.

NOTICE (OF DISHONOUR.)

A count on a banker's check alleged that it had been drawn by the defendant upon a banking firm; that it had been presented for payment, and had not been paid; that the bankers had no effects of the defendant, and that the defendant had sustained no damages by reason of his having received no notice of dishonour of the check: *Held*, on general demurrer, that the declaration disclosed a sufficient excuse for the want of notice of dishonour. *Kemble v. Mills*, 446

NOTICE (TO PRODUCE.)

On an appeal against an order of removal, it is the duty of the appellants to produce the original order, and if it is in the hands of the respondents, the appellants cannot put in evidence the copy which has been served upon them, unless they have given notice to the respondents to produce the original. *The Queen v. The Justices of Sussex*, 125

NOTICE (TO QUIT.)

If a notice to quit is served on the tenant's wife, at the house, accompanied by a statement that the paper

NOTICE, &c. 1098

delivered, is "a notice of discharge," it is sufficient. *Smith v. Clark*, 202

NOTICE (OF RENDER.)

See RENDER, 2.

NOTICE (TO JUSTICES.)

1. The notice to justices, required by the 13 Geo. 2, c. 18, s. 5, for removing their order by certiorari, should state the name of the party intending to sue forth the writ; and on motion for the certiorari, the Court must be satisfied on the affidavits, that the party so named is the party by whom, or on whose behalf, the notice was given, and the application is made. *Regina v. The Justices of Shrewsbury and Salop*, 501

2. The justices, on whom the notice was served, must be identified with the justices who made the order. *Ib.*

3. It is not sufficient if it appears on the affidavits, that an order of the same date, and to the effect described in the notice, was made by justices of the same name as those to whom notice was given, *Ib.*

4. Enlarging the rule nisi, by consent, will not cure objections to the notice. *Ib.*

5. Notice of an intended application for a certiorari to remove an order of justices in Quarter Sessions, made on the hearing of an appeal, stated the names of the appellant and of the respondent, and was signed by J. B., attorney for the respondents, and the notice was given to three justices, who were sworn to have been present at the trial and hearing of the appeal; *Held*, a sufficient notice under stat. 13 Geo. 2, c. 18, s. 5. *Regina v. The Justices of Wilts*, 524

6. Where an order of Sessions has been returned to this Court under a certiorari, and a rule is then obtained, to quash the order, it is a good preliminary objection to an argument on such rule that no notice of it has been

served on the justices who made the order, although served on the parties interested in supporting it. *Regina v. Spackman, in re the Blandford Roads*, 1060

NUISANCE.

See JUDGE'S CERTIFICATE, 1.

NULLITY.

See PLEA, 2.

WAIVER, 1.

OFFICE, (COPIES OF AFFIDAVITS).

Where a counsel, on appearing to show cause, is not prepared with office copies of the affidavits, on which a rule has been obtained, it is a matter of discretion in the Court, whether time shall be allowed to take office copies. *In the matter of Rogers*, 926

ORDER (OF AFFILIATION).

See BASTARD, 3.

ORDER, (OF COURT).

An order of the Court of Chancery, requiring the defendants in a suit to pay a certain sum into the Bank with the privity of the Accountant General, to the credit of the cause, is not an order, which has the effect of a judgment within the provisions of the 1 & 2 Vict. c. 110, s. 18. *Gibbs v. Pike*, 731

ORDER (OF JUDGE).

See WARRANT OF ATTORNEY, 9.

ORDER, (OF REMOVAL).

See NOTICE, (TO PRODUCE).

ORIGINAL DOCUMENT.

See PUBLIC DOCUMENT.

OUTLAWRY.

See DISTINGAS, 13.

In an action against a member of

Parliament, it is incompetent for the plaintiff, either upon mesne or final process, to sue out writs for the purpose of proceeding to outlawry, although he may have no present intention of putting them in execution. *Cassidy v. Steuart, M.P.*, 366

OVERSEERS.

Where justices met in petty sessions to appoint overseers, in due time, after the 25th of March, pursuant to the 54 Geo. 3, c. 91, and, in consequence of a difficulty with respect to certain appointments, they adjourned the consideration of those appointments to a day more than fourteen days from the 25th of March, an appointment made with respect to them on such day of adjournment was held good, as the sessions had become possessed of the subject matter: and other appointments made for the same township by other justices, within fourteen days after the 25th March, invalid. *Regina v. Sneyd and Another*, 1001

OYER.

Where a defendant pleads an indenture, and the plaintiff craves oyer, and then, without setting forth the indenture on the record, replies non est factum, and adds the similiter for the defendant, and delivers the issue with notice of trial, the defendant may return the issue, and pray that the deed may be enrolled, and if plaintiff afterwards proceeds to trial upon the issue as originally delivered, it is irregular, and the Court will set aside the verdict. *Smith v. Jennings*, 155

PARLIAMENT, (MEMBER OF).

See OUTLAWRY.

PAROL AGREEMENT.

See PLEA, 15.

PARTNER.

PARTICULARS.

1. *Seemle*, that on a reference to arbitration, the particulars of the plaintiff's demand are not necessarily before the arbitrator, therefore, if the defendant seeks to restrict the plaintiff's claim to the amount of the particulars, he should produce them. *Kenrick v. Phillips*, 308

2. A notice of declaration was served on the defendant, dated 8th of January, 1840, instead of 1841, but attached to it was a bill of particulars, correctly dated; the action had been commenced in May, 1840: *Held*, that the defendant could not have been misled by the erroneous date, and the Court refused to set aside the notice. *Coates v. Sandy*, 381

3. A plaintiff erroneously inserted in the particulars of demand, as among the payments for which he gave credit, an article, which, in fact, had not been paid for, but returned: *Held*, that the judge rightly left it to the jury to say whether, in fact, the balance of the whole account was or not in the plaintiff's favour. *Lambe v. Micklethwaite*, 531

PARTNER.

See ATTACHMENT, 7.

CONDITION.

EJECTMENT, 16.

The plaintiff sued three defendants upon a bill of exchange, for 49*l.* 14*s.* 6*d.* The contract upon which the amount of the bill accrued due was entered into, before the partnership of one of the defendants; but a part of the debt, the consideration of the bill, was incurred after the commencement of the partnership: *Held*, that the plaintiff was entitled to a verdict against all the members of the partnership for the amount of debt incurred subsequently to the commencement of the partnership. *Wilson v. Bailey, Potter, and Lewis*, 18

PLEA.

1096

PATENT.

See JUDGE'S CERTIFICATE, 4.

PAYMENT INTO COURT.

In an action of assumpsit against two defendants, the declaration contained an indebitatus count for work and labour, and the ordinary money counts; the amount claimed was 44*l.* 12*s.* 4*d.* The defendants jointly paid into Court the sum of 30*l.*, and pleaded that beyond that amount they did not promise: *Held*, that by that payment into Court, the defendants admitted their liability only as far as the 30*l.*, and were entitled to dispute their further liability. *Archer, Gent., one &c., v. English and Walker*, 21

2. Where the declaration is upon a special contract, and the defendant pays money into Court, that payment admits the whole contract, *Ib.*

PEREMPTORY UNDERTAKING.

The Court will, under certain circumstances, and on payment of costs, permit a plaintiff to enlarge, by the period of four months, the time for fulfilling a peremptory undertaking. *Wyatt v. Nicholls*, 327

PETTY SESSIONS.

See OVERSEERS.

PLAINT.

See BRIGHTON COURT OF REQUESTS, 2.

PLAINTIFFS, (SEVERAL).

See SMALL DEBTOR, 4.

PLEA.

See COVENANT, 3.

DECLARATION, 4.

STATUTE, (DESCRIPTION OF).

1. A plea of the general issue "by

statute," is within the meaning and operation of the rules of H. T., 4 Wm. 4, and the Court will not suffer the defendant to put it on the record, together with a special plea raising the same grounds of defence. *Legge v. Boyd*, 39

2. A plea dated and delivered on the 23rd of October, is a mere nullity, and, it seems, that the plaintiff may sign judgment as for want of a plea, but if he applies to the Court to set it aside, he must come within four days from the expiration of the time to plead. *Mills v. Brown*. 151

3. The plea of liberum tenementum, admits the plaintiff's possession, and renders it incumbent on the defendant to prove title, either by deed or by shewing twenty years' actual possession. *Grice v. Lever*, 246

4. A declaration stated in consideration that R. J., at the request of defendant, would, by writing obligatory, acknowledge himself bound to W. J. in the penal sum of 600*l.*, to be paid to W. J., the defendant would indemnify R. J., his executors, &c., from any loss by reason of his executing the said writing obligatory; it then alleged the execution of the bond by R. J., his death, and grant of administration to plaintiff, and stated, as a breach, that plaintiff, as administratrix, was called upon, and forced, and obliged to pay the sum secured by the writing obligatory, and also a further sum for costs, &c.

Plea, that plaintiff was not called upon, or forced or obliged to pay the said monies, nor was the plaintiff damnified modo et formâ. At the trial, it appeared that the bond was conditioned for payment, *after six months' notice*, and there was no evidence that notice had been given to plaintiff before payment.

Held, that the objection as to want of notice could not be taken on these pleadings, and that in order to raise it, the defendant should have set out

the condition of the bond in the plea, and averred that no notice had been given. *Jones, Administratrix of R. Jones v. Williams*, 252

5. To debt on bond given as a security for the due performance of the office of collector of rates, and conditioned for payment of all monies received "by virtue, and for the purposes of a certain act of Parliament, and relative to the collectorship of such rates," the defendant pleaded, that "no rate was made, or in any way existed, which he could legally and according to law, collect or get in, or could legally, or according to law, demand or obtain by virtue of his said office, and that he did not, during the continuance of his appointment, legally receive any money, by virtue, or for the purposes of the said act, or relative to the collectorship of the said rates.

Held, that the former part of the plea would have been held bad on special demurrer, as a negative pregnant, for not shewing in what way the rate was illegal, but those objections not having been raised, the latter averment afforded a substantial answer to the action. *Webb v. James and Others*, 314

6. To an action against the Marshall for an escape, the defendant pleaded, that after the alleged escape of the prisoner, he, before the commencement of the suit, and before the defendant had notice of such escape, voluntarily and of his own accord returned again into the custody of the defendant, and that he, the said defendant, did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and before and at the commencement of this suit, kept and detained, "and still doth keep and detain the said prisoner in his custody as such Marshal, in execution, at the suit of the plaintiff:" *Held*, that under the terms of the plea, evidence of an escape

since the commencement of the suit, was inadmissible. *Davis v. Chapman*, 645

7. The plaintiff obtained a judgment in an action against a public officer, under the provisions of the 7 Geo. 4, c. 46; and subsequently sued out a writ of sci. fa., against fifteen persons, whom he charged as members of the corporation, of which the original defendant was the representative public officer; the sheriff returned as to all the defendants that they had nothing, and were not to be found in his bailiwick; twelve of the defendants voluntarily appeared, and the plaintiffs declared against them: Upon demurrer, assigning for cause, that it did not appear that the then defendants who had not come forward, were included in the proceedings, it was held, that such an objection could only be an irregularity, and to be taken advantage of, on motion under the stat. 4 Anne, c. 16, and not upon demurrer; that the objection of non-joinder could not be raised upon demurrer, because there was nothing, on the face of the record, to shew that the three defendants, in question, were alive, and that the writ could not, therefore, be abated, on the ground of non-joinder; and, also, that as by the terms of the statute, 7 Geo. 4, c. 46, such persons as are sued, being members of the co-partnership, have their remedy for contribution against the other members of the same corporation, though not joined with them in the declaration in scire facias, a plea in abatement for non-joinder of those other members would be bad, and a demurrer to the declaration for the same cause, therefore, could not be sustained. The plaintiffs declared, in scire facias, reciting a judgment recovered against one W. M., one of the public registered officers, for the time being, of the Imperial Bank of England, under the stat. 7 Geo. 4, c. 46, and prayed judgment against certain

members of the co-partnership, carrying on the business of the Bank: Plea, that at the time of the recovery of the judgment against W. M., the said W. M. was not one of the public officers of the said corporation; conclusion to the country: *Held*, on demurrer, that the plea admitted that W. M. was sued as a public officer, and that in denying that he was such public officer at the time of the recovery, it introduced new matter upon the record, in respect of which, the plea should have concluded with a verification, and not to the country: *Held* also, that such a plea insufficiently stated a defence that W. M. had ceased to be the public officer of the Company, after the commencement of the original suit, and before judgment recovered.

Query, where a defendant sought to avail himself, in such a case, of a defence, that the judgment was obtained by fraud and collusion between the plaintiff and the public officer, how he should take advantage of that defence. *Fowler and Others v. Richerby and Others*, 682

8. To trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that an action was brought by him against the plaintiff which was referred to arbitration, and that the arbitrator awarded a certain sum to be due to the defendant, and ordered the plaintiff to pay it on a certain day, which the plaintiff having refused to do, the defendant issued a writ of fi. fa., and levied on the plaintiff's goods. Replication, that by a rule of Court, the said writ was ordered to be set aside for irregularity: Rejoinder, by way of estoppel, that after the making of the rule of Court, the plaintiff ruled the sheriff to return the writ: *Held*, upon special demurrer to the rejoinder, that the replication was good, and that it was unnecessary to aver that the rule of Court was acted on.

Secondly, that the act of ruling the

sheriff to return the writ, did not estop the plaintiff from shewing that the writ was not a good writ; neither did the filing of record affirm the existence of a void writ.

Thirdly, that the 1 & 2 Vict. c. 110, s. 18, does not authorize a party to issue execution for money ordered to be paid by an award.

Held also, that though the statute does not authorize execution unless the amount appears by the order, yet execution may issue for costs when ascertained by the officer, and that it is not necessary there should be an order after the officer has taxed. *Jones v. Williams and Others*, 702

9. To debt for goods sold, &c. the defendant pleaded nunquam indebitatus, except as to 5*l.* 10*s.* 3*d.*, and as to that sum, he pleaded against the further maintenance of the action, payment of 5*l.* 13*s.* 7*d.* in full satisfaction and discharge of all the causes of action, relating to 5*l.* 10*s.* 3*d.*, taking no notice of the damages and costs.

Held, on special demurrer, that the plea was good, and that the plaintiff might sign judgment for any damage unanswered. *Henry v. Earl*, 725

10. A declaration stated that the plaintiff put up to sale by auction, certain premises subject to the conditions that the purchaser should complete the purchase on a certain day, and that the vendor should deduce a good title to the premises commencing with the lease under which they were held; it then alleged that although the plaintiff did deduce a good title, &c., yet the defendant did not complete the purchase: Plea, that the premises were demised by L. to B., for a term of years, subject to a covenant by B. to repair, and in the event of his not repairing, that L. might enter, that the interest of B. vested in the plaintiff who suffered the premises to be out of repair, at the time of the sale, so that the term might be de-

termined at the option of L. *Held*, bad, as amounting to an argumentative traverse, that the plaintiff deduced a good title. *Wheeler v. Wright*, 729

11. Where a special plea requiring counsel's signature, is delivered without it, the plaintiff may sign judgment, notwithstanding there are other pleas to the whole declaration, which do not require counsel's signature. *Shield v. Twigg*, 751

12. The defendant having pleaded not guilty, "by statute," the Court, upon affidavit that the plaintiff could not discover the statute, ordered the defendant to point it out, or that the words "by statute," be struck out of the margin of the plea. *Coy v. Lord Forrester*, 770

13. Under the plea of non assumpsit to a count on an account stated, the defendant may shew that there were errors in the account. *Thomas, Administrator, &c., of W. Thomas, v. Hawkes, and Another*, 801

14. The plaintiff declared for 163*l.* 16*s.* being the amount of rent claimed to be due in respect of the use and occupation of apartments in his house by the defendant, for one year at a certain weekly rent from the 25th of February, 1839, to the 24th of February, 1840. The defendant pleaded as to so much of the rent claimed as accrued due, "before and on the 27th of July, 1839," payment. *Held*, that the plea was uncertain, the period between the 25th of February, and the 27th of July, being twenty-one weeks and five days, and, that the words "and on" could not be rejected so as to render the plea applicable only to the period of twenty-one weeks. *Dunn v. Di Nuovo*, 841

15. The plaintiff declared in covenant, and the declaration alleged the making of a lease in the lifetime of J. W., of whom the plaintiff was surviving executor, by which certain premises were demised to the defendant

for a term, covenants being contained in the instrument to repair and maintain all erections and improvements on the demised premises, and to surrender and yield up the premises with all such improvements, &c., being well and sufficiently maintained, &c.; breach, alleging the making of a greenhouse, which was an erection and improvement on the premises, and its removal before the yielding up of the premises. The defendant pleaded that he assigned the premises to one T. J. B., who assigned them to J. P., who assigned them to W. H., and that it was agreed between the testator and the said W. H., and the said testator then promised the said W. H., that if he would make and set up a certain improvement, to wit, a green-house, in and upon the demised premises, he should be at liberty to pull down and remove the same: Replication, *de injuriâ*. At the trial of the cause, the jury returned a verdict for the defendant on the issue, but assessed conditional damages to the plaintiff. Upon motion for judgment non obstante veredicto; *Held*, that the plea was ill, as setting up a parol agreement to vary a contract under seal. *F. T. West, Executor of John West, v. Blakeway*, 846

16. Where a defendant in an action of trespass and false imprisonment, seeks to give the special matter in evidence, under a plea of not guilty, by virtue of the provisions of the 10 Geo. 4, c. 44, s. 41, it is necessary that he should insert the word, "by statute" in the margin of the plea, in obedience to the R. G., T. T., 1 Vict., notwithstanding the provisions of the 3 & 4 Wm. 4, c. 42, s. 1, (in pursuance of which the rule of T. T., 1 Vict. was framed) that no rule or order made by virtue of its enactments, shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case where he may be

entitled to do so, under any act of parliament, now, or hereafter to be in force. *Bartholomew v. Carter* 896

17. The pleading rules of H. T., 4 Wm. 4, do not interfere with the effect, which, previous to them, was given to the plea of the general issue, when allowed by statute. *Ross v. Clifton and Another* 1033

PLEA, (IN ABATEMENT.)

Seemle, that under the 3 & 4 Wm. 4, c. 42, s. 8, the affidavit verifying a plea in abatement for the non-joinder of a party as co-defendant, must state his actual residence at the time of making the affidavit. *Wheatley v. Golney*, 1019

PLEA, (ISSUABLE.)

In an action by indorsee against acceptor of a bill of exchange, a plea that the drawer had been twice a bankrupt, and that his estate had not produced 15s. in the pound, under the second fiat, is an issuable plea. *Mackay v. Wood*, 278

PLEA, (SETTING ASIDE.)

To an action by payee against makers of a promissory note, the defendants pleaded that there was no consideration for the note, and that it was made subject to the condition that the defendants should not be called upon to pay the same if they were not able, but that the same should be renewed. Upon affidavit that the plea was false, the Court allowed the plaintiff to sign judgment. *Midford v. Finden and Another*, 813

PLEA, (STRIKING OUT.)

A. guaranteed to B. the payment of a sum of money advanced on certain shares in a Company, "in case the shares should not make up the sum due." In an action on the gua-

1100 PLEAS, (SEVERAL.)

rantee, the declaration alleged that the shares were of no value. The defendant by his plea, traversed that allegation: *Held*, that a judge at Chambers rightly struck out the plea as tendering an issue, that was not material to the question in dispute between the parties. *Murray v. Boucher*, 537

PLEAS, (SEVERAL.)

See INTRUSION.

PLEA, 1.

1. Pleas, alleging the consideration of a debt to be money lent for the purposes of gaming; and money lost at play may be pleaded to the same declaration, without the imposition of a condition that different matters of defence, shall be given in evidence under them. *Temple v. Keily*, 62

2. To an action on an agreement to deliver etchings of certain drawings to be supplied by the plaintiff, the defendant sought to plead, in addition to pleas of non assumpsit, that the plaintiff delivered unfit and improper outlines; that the defendant was prevented by the act of God, from completing his contract, and leave and license; three further pleas, namely, that the plaintiff did not supply the drawings; that the plaintiff neglected to supply the drawings for an unreasonable time after the making of the agreement, and thereby prevented the defendant from delivering the etchings within the specified time; and that the plaintiff delivered the drawings, but that they were unfit and improper for the purpose: The Court refused to allow these three pleas to be pleaded, but gave the defendant leave to select one from among them. *Griffiths v. Roberts*, 674

3. Where issues on special pleas have been found for the plaintiff, the judge, at the trial, may still, under the 4 Anne, c. 16, s. 5, certify, that the defendant had probable ground

POWER OF COURT.

for pleading such pleas, and, under this certificate, the Master may, notwithstanding the rule, H. T., 4 Wm. 4, s. 7, allow the defendant the costs of those issues.

Quære, whether such a certificate can be granted except at the time of the trial. *Fry v. Monckton*, 967

PONE PER VADIOS.

See REPLEVIN, 3.

POOR LAW UNION.

See BASTARD, 4, 5.

POSSESSION.

See PLEA, 3.

POSTMAN.

See ATTORNEY GENERAL.

POSTPONING TRIAL.

Intelligence having been received of the death of the plaintiff abroad, the Court, upon the application of the defendant, granted a rule for postponing the trial, until the Court, or a judge should direct it to be had, the plaintiff's attorney admitting that some doubts existed as to whether his client was still alive or not. *Cheeser v. Ridgway*, 67

POUNDAGE.

See SHERIFF, 2.

POVERTY.

See BAILING FELON.

SECURITY FOR COSTS, 3.

POWER.

See ARBITRATION, 9, 22.

POWER OF COURT.

Where a judgment and execution

PROCHEIN AMY.

are set aside for irregularity, the Court has no power to impose the term on the defendant, that he shall bring no action. *Adlam v. Noble*, 322

PRESUMPTION.

See PLEA, 8.

PROHIBITION, 2.

PRISONER.

See AMENDMENT, 2.

DECLARATION, 5.

1. Where a defendant who has been arrested by a judge's order, pursuant to 1 & 2 Vict. c. 110, s. 3, seeks to obtain his discharge pursuant to section 7, on the ground of a substantial objection to his arrest, he is not bound to apply before the expiration of the time for putting in bail. *Walker v. Lumb*, 131

2. It seems, that if the defendant gives a satisfactory explanation of the facts which have led to his arrest, the plaintiff ought, in answer to his application for discharge, to disprove that explanation, *Ib.*

PRIVILEGE (FROM ARREST.)

See BARRISTER.

PROCHEIN AMY.

See SECURITY FOR COSTS, 4.

1. The wife of a minor having committed adultery, the minor's father procured himself to be appointed prochein amy, and commenced an action for criminal conversation, without the knowledge or authority of his son: *Held*, that he was entitled to do so, and that a judgment in that action would be a good bar to any proceedings for the same cause by the son, when of age. *Morgan, (an Infant by his next Friend) v. Thorne*, 228

2. A prochein amy is a guardian appointed by the Court, and may sue

PUBLIC DOCUMENT. 1101

without any authority from the minor. *Ib.*

PROHIBITION.

1. Where the matter is within the jurisdiction of an Ecclesiastical Court, this Court will not interfere by prohibition, to prevent an adjudication upon it. *Hallock v. The Masters and Fellows of the University of Cambridge*, 583

2. The grant of a faculty to appropriate certain parts of a parish church is within the jurisdiction of the Ecclesiastical Court; and this Court will not presume that that jurisdiction will be improperly exercised, and, therefore, will not prohibit the Ecclesiastical Court from proceeding to judgment, although the faculty *prayed* for is larger than that Court has power to grant, *Ib.*

PROMISSORY NOTE.

See JUDGE'S POWER, 2.

PLEA SETTING ASIDE.

REPLICATION, 10.

PUBLIC DOCUMENT.

At the trial of an action of trespass in which the question raised was upon the plaintiff's title to an estate, upon which the trespass was alleged to have been committed, a deed was produced by the plaintiff which came by surprise upon the defendant, who thereupon submitted to a verdict. The defendant having obtained a rule nisi for a new trial upon the ground of surprise, the plaintiff sought to procure a copy of the deed, said to be in the possession of the defendant, and which it was supposed might vary the title set up on the deed produced by the plaintiff at the trial; but it was held that he was not entitled as of right to demand an inspection of the deed; and it appearing that the deed was a public document, the contents

1102 QUO WARRANTO.

of which were set forth on the face of an inquisition, *post mortem*, filed in the Rolls Chapel, the Court refused to compel the production of the original. *Wood v. Morewood*, 669

PUBLIC OFFICER.

See PLEA, 7.

QUARTER SESSIONS.

See APPEAL, (TO QUARTER SESSIONS).

APPEAL, (HEARING).

BARRISTER.

BASTARD, 1.

1. The Court will not issue a mandamus to a Court of Quarter Sessions, commanding them to *grant* a case, although under special circumstances it may issue such a mandamus, commanding the sessions to *state* a case. *Ex parte Inhabitants of Jarvin*, 120

2. The Quarter Sessions have no power to give costs *against* an appellant under 15 Geo. 3, c. 11, s. 4. (The Thames and Isis Navigation Act.)

Semble, that the provision does not apply to the respondents. *Regina v. Justices of Oxfordshire*, 189

QUO WARRANTO.

1. On a motion for a quo warranto, an affidavit, stating that it is the intention of deponent, in case the Court should order the information to be filed, to become *bonâ fide* the relator, is insufficient under Reg. Gen., M. T., 3 Vict., which requires an affidavit that the motion is made at the instance of deponent as relator. *Regina v. Hedges*, 493

2. After a rule for a quo warranto information has been made absolute, the Court will change the relator, on motion on his behalf, if by reason of his necessary absence from England, in the conduct of his own private affairs, he is unable to enter into the recognizance required by the 4 & 5

REPLICATION.

W. & M. c. 18, s. 2. *Regina v. Quayle*, 548

REPLICATION.

See PLEA, 8.

1. To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, 1st, that the drawer lent to the defendant certain sums of money for the purpose of gaming, and that for securing payment of the same, the defendant accepted certain bills of exchange, in lieu of which the bill declared on was given, and that the plaintiff had notice of the premises. 2ndly, a similar plea, alleging that the drawer, and certain persons, to the defendant unknown, won money of him, by gaming. *Held*, that *de injuriâ* was a good replication. *Humphreys v. O'Connell*, 213

2. To covenant for rent against the lessee of tolls the defendant pleaded, that before the rent became due, the plaintiff entered upon the tolls, and then ejected, expelled, put out, and removed the defendant from possession thereof: Replication, that plaintiff did not *enter*, eject, expel, &c.

Held, that the traverse of the entry was bad on special demurrer. *Palmer and Another v. Goden and Others*, 248

3. A count in assumpsit stated, that the plaintiff made his bill of exchange, which the defendant accepted, and that before the bill became due, the plaintiff had parted with the possession thereof, and thereupon, in consideration, that the plaintiff would again procure possession of the bill, and prevent the same from being presented for payment, the defendant would remit the plaintiff the amount (728*l.* 6*s.*) on a certain day: averment of performance by plaintiff, and breach by defendant.

Plea, as to 609*l.* 10*s.* parcel of the said sum of money therein mentioned, that defendant paid to plaintiff 700*l.*, in satisfaction of the sum of 609*l.* 10*s.*

parcel of certain monies specified in a bill of exchange, dated, &c., which is the same identical bill declared on.

Replication, denying that the bill mentioned in the plea, is the same identical bill, concluding to the country: *Held*, that the replication was bad on special demurrer.

Semble, that the plea was also bad for not alleging the money to have been paid, in satisfaction of damages.

Wheeler v. Senior, 270

4. To trover by the assignees of a bankrupt, the defendant pleaded that before the bankruptcy, he lent the bankrupt a sum of money, upon the deposit of the goods in question.

Replication, that it was corruptly, and "against the form of the statute, &c.," agreed between the defendant and the bankrupt, that the latter should pay the defendant for the loan of the money above ten per cent. *Held*, on special demurrer, that the averment of the contract being against the form of the statute, was not a sufficient allegation that it was illegal, and that the replication was bad, for not alleging either that the contract was made before the 7 Wm. 4, and 1 Vict. c. 80, and 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts. *Turquand and Others, Assignees of Vanderplank, a Bankrupt, v. Mosedon*, 282

5. De injuriâ, &c., may be replied in an action of debt on simple contract, but subject to the rules and exceptions in *Crogate's* case, which govern its admissibility in actions of tort. *Purchell v. Salter*, 517

6. In debt for goods sold and delivered, the defendant pleaded that the plaintiff sold and delivered the goods by one M., his agent; that M. as such agent, and with plaintiff's consent, sold the goods in his own name, as the true owner; that the defendant did not know, and had not the means of knowing the plaintiff to

be the owner, and bought and received the goods as the proper goods of M.; that at the time of the sale, M. was, and is indebted to the defendant, in a sum exceeding the debt and damages, and that the defendant is willing to set off the monies so due from M. The plaintiff replied de injuriâ, &c.: *Held*, on demurrer to the replication, that the plea was good, as a plea in excuse, and that de injuriâ, &c., might be replied to it. *Ib.*

7. To a common count in debt, the defendant pleaded payment into Court, and that he never was indebted to a greater amount: Replication, that he was indebted to a greater amount: *Held*, on demurrer, that the replication was bad, for not stating that the defendant "was and is indebted," according to the form of replication, provided by Reg. Gen., T. T., 1 Vict. *Faithful v. Achley*, 555

8. In an action on a bill of exchange, alleged in the declaration to have been indorsed by M. to the plaintiff, the defendant pleaded that the bill was drawn and accepted without value, and that there never was any consideration for indorsing the bill by any of the parties, nor for the indorsement by M., nor for M. paying the amount; Replication, that the indorsement by M. was in blank, and that R. who appeared to be, and plaintiff believed to be, the lawful holder of the bill, indorsed the same to plaintiff, for value, to wit, &c. Special demurrer, for want of stating consideration for the drawing or accepting of the bill, and for departure as to the allegation of the indorsement to the plaintiff: *Held*, that the replication was good, as the plaintiff, against whom there was no allegation of fraud, sufficiently set up his own title by alleging an indorsement to him for value by a person whom he believed to be the lawful holder of the bill. *Arbourn v. Anderson*, 595

9. To assumpsit by indorsee against

acceptor of a bill of exchange, the defendant pleaded that he by D., his agent duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of D., as such agent, a sum, in satisfaction and discharge of the cause of action: Replication, that the defendant, by the said D., his agent, did not pay to the plaintiff, nor did the plaintiff accept or receive of D., as such agent, the said sum in satisfaction, &c. *Held*, good on special demurrer. *Bennison v. Thelwall*, 739

10. To an action by indorsee against drawer of a bill of exchange, the defendant pleaded that after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to certain persons, whose names are to the defendant unknown, and who, from the time of such indorsement, until, and at, and after the time when the bill became due, and when the action was commenced, were the holders thereof: Replication, that the said persons in the plea mentioned, were not, when the action commenced, the holders of the bill, modo et formâ.

Held, on special demurrer, that the replication was good, though the more scientific mode of replying to such a plea would have been "that the plaintiff, at the time of action brought, was the holder of the bill, absque hoc, that the persons mentioned in the plea were, at that time, the holders thereof."

Semble, that the plea would be bad on special demurrer, as being an argumentative denial that the plaintiff was the holder of the bill at the time of action brought. *Fraser (Public Officer, &c.) v. Welsh and Others*, 754

11. To an action by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.* payable on demand; the defendant pleaded as to 3*l.*, parcel, &c. a set-off at the time of demand. And as to 12*l.* 9*s.* 4*d.* residue, &c., a

tender of that sum, at the time of demand. Replication to the first plea denied the set-off, at the time of the commencement of the suit; as to the second plea, that before the making of the tender, the sum of 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.* was due upon the note, which sum the plaintiff demanded, but the defendant refused to pay the same, and that no set-off or other just cause existed for the non-payment. *Held*, that the replication was good. *Cotton v. Godwin*, 763

12. To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded, that after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to W., who, from thence, until, and at and after the commencement of the suit, was, and still is, the indorsee and holder thereof. Replication de injuriâ: *Held*, that the plea was not in excuse but in denial of the breach in the declaration, and, consequently, de injuriâ was not the proper replication. *Schild v. Kilpin*, 803

RAILWAY.

A mandamus to a Railway Company, commanding them to summon a jury to assess compensation to a claimant will not be granted, where it appears that the works calculated to damnify the claimant, are still bonâ fide proceeding, although the applicant also claims for land taken by the Company, and considerable delay has taken place since the commencement of the works. *Ex parte Parkes*, 614

RATE.

See PLEA, 5.

REASONABLE TIME.

See JUDGE'S CERTIFICATE, 9.

RENDER.

RECEIPT.

See TENDER.

RECOVERY.

Where the deed to lead the uses is sufficient to cover all the lands intended to be passed, an application to amend the recovery, by inserting the name of a parish under the 3 & 4 Wm. 4, c. 74, s. 8, Fines and Recoveries Act, is unnecessary. *Re Watkins*, 58

REGISTRAR OF BIRTHS.

The 6 & 7 Wm. 4, c. 86, which directs that a register of all births, &c., shall be kept, does not give the Court any power to interfere, by mandamus, to correct a false entry on the register. *In re The Registrar of Births, &c., at Brixton*, 927

RELEASE.

See SECURITY FOR COSTS, 1.

RELATION.

Where a mortgagee died on the 20th of April, interlocutory judgment having been signed on the 17th, in Easter Term, the Court refused to grant a rule for referring it to the Master to compute principal and interest on the mortgage deed, the application being made in Trinity Term. *Pitt v. Parker*, 1059

RELATOR.

See QUO WARRANTO, 1, 2.
SECURITY FOR COSTS, 2.

RENDER.

1. Where a bond is given pursuant to 1 & 2 Vict. c. 110, s. 8, a render may be made before judgment, although a literal construction of the words of the condition would require a render afterwards. *Saunderson and Others v. Parker*, 495

REPLEVIN. 1105

2. An affidavit of the notice of render need not now be made pursuant to Reg. Gen., 1 Ann. T. T. 495

3. After the render, if the plaintiff lodges a ca. sa. with the sheriff against the defendant, it is irregular, and the Court will set it aside, and stay proceedings on the bond. *Ib.*

RENT.

See PLEA, 14.

REMOVAL, (OF CAUSE).

See DECLARATION, 5.

REMOVAL, (OF PROCEEDINGS).

See REMOVAL OF CAUSE.

A local Court act provided that no plaint, order, judgment, or proceeding therein, should be removed into a superior Court, except by leave of a judge, and then only when the debt exceeded 5*l.* and that in all such cases, it should be lawful for a judge to stay proceedings, &c., and concluded with a proviso that the enactments of the 1 & 2 Vict., c. 110, respecting the removal of judgments from inferior Courts to the Courts at Westminster, for the purposes of execution, should be applicable to the local Court.

Held, that a judge had no power to remove the proceedings, after judgment, except for the purpose of having execution issued on them. *For v. Veal*, 798

REMOVAL.

See APPEAL, (TO QUARTER SESSIONS).

REPLEVIN.

See SHERIFF, 5.

1. If a defendant, in replevin, obtains judgment of non pros. for a return, and a certain amount for costs,

1106 RESTITUTION, (WRIT OF).

the judgment is not final, until taxation; but would be final if it had been for a return only. *Wright v. Lewis*, 183

2. In such a case, the defendant, in order to obtain his costs, should assess them before a jury, as consequential to his damages, *Ib.*

3. If a writ of pone per vadios, be made returnable in Vacation, instead of Term, although by mistake, the Court will set it aside, *Ib.*

4. Where a replevin bond was taken in a penalty, greater than the amount of goods distrained, and with a clause in the condition to indemnify the sheriff for granting the replevin, and it appeared that the bond had been executed in September, and assigned in February, but no application to set it aside was made till Easter Term, the Court refused to set it aside on those grounds, but intimated that it was objectionable that the bond should be taken in such an amount, and that the frequent practice so to do, and the delay were the only causes for not interfering to set it aside.

The terms on which the Court will stay proceedings on a replevin-bond at the instance of the sureties are the payment of the appraised value of the goods, if that is less than the amount of rent due, the double costs, and the costs of the application. *Miers v. Lockwood*, 975

REQUESTS, (COURT OF).

See COURT OF REQUESTS.

RESTITUTION, (WRIT OF).

Where a defendant in ejectment, having been put out of possession by the sheriff, and possession given to the lessor of the plaintiff, afterwards, on the same day, forcibly resumed possession of the premises, the Court ordered a writ of restitution to issue within a week, the defendant paying

RULE, (SERVICE OF).

the costs of the application for the writ. *Doe d. Pitcher v. Roe*, 971

RETROSPECTIVE STATUTE.

See BANKRUPT, 1.

REVOKING, (SUBMISSION).

See ARBITRATION, 3, 11.

RIGHT OF ACTION.

See DECLARATION, 3.

In a contract for the sale of land, it is the duty of the vendee to prepare the conveyance, unless there is an express stipulation to the contrary; therefore, in an action against him for non-payment of the purchase-money, the declaration need not allege a tender or offer to convey, but it is sufficient to state that the plaintiff was ready and willing to convey.

By articles of agreement for the sale of certain premises, the defendant covenanted with the plaintiff, and with the several other parties beneficially interested in the premises. *Held*, that their interest was several, and that the plaintiff might sue alone. *Poole v. Hill*, 300

RULE, (SERVICE OF).

See ARTICLED CLERK, 3.
SERVICE (OF RULE).

1. An affidavit of service, pursuant to Reg. Gen., T. T., 3 Vict., is sufficient, if the service is sworn to have been effected "on the attorney or agent for the plaintiff in this cause." *Morris v. Bedward*, 130

2. It is sufficient to serve a rule nisi to compute on "a female in the habit of receiving messages for the defendant at his dwelling-house." *Edwards v. Napier*, 177

3. In an action against several defendants on a bill of exchange, if they let judgment go by default, service of

SCOTCH DECREE.

a rule to compute on one is sufficient.
Arnold v. Evans, 219

RULE, (TO COMPUTE).

A rule nisi to set aside an interlocutory judgment, with a stay of proceedings having been granted, the Court refused to make a rule to compute on that judgment absolute.
Anderson v. Southern, 994

SCIRE FACIAS.

See PLEA, 7.

1. Where a notice of scire facias was left with a person who represented herself to be the defendant's house-keeper, and who stated that the defendant was somewhere in London, and that she could not account for his absence, except that he was avoiding legal process, the Court granted a rule to sign judgment for non-appearance.
Dixon v. Thorold, 827

2. Where after ten years had elapsed from signing judgment in ejectment, execution was issued without reviving the judgment by scire facias, the Court held the want of a scire facias to be such a substantial defect as that delay from the 30th of December to the 8th of May following, in applying to set aside the execution was not such laches as to deprive the tenant of his right to succeed in the application. Such an application may be made by the tenant in possession who has been served with the declaration, but has not appeared, judgment having been signed against the casual ejector; but costs cannot be awarded against the lessor of the plaintiff, without consent.
Goodtitle d. Murrell v. Badtitle, 1009

SCOTCH DECREE.

To an action of assumpsit, brought upon a decree obtained in the Court of Session, in Scotland, the defendant pleaded, that he was not, at the time

SECURITY FOR COSTS. 1107

of the commencement of the suit in that Court, or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of that Court, nor was he, at any time, before the pronouncing of the decree, in any manner, according to the course and practice of the said Court, notified, nor did he know of the proceedings, so that he might, by himself, his proctor, attorney or agent, appear, or plead, or in any way defend himself in the action, nor did he appear in or to any of the proceedings, whereby the decree was contrary to natural justice, and wholly inoperative and void against the defendant. *Held*, ill.
Cowan and Another v. Braidwood, 20

SCRIVENER.

See BANKRUPT, 5.

SECOND APPLICATION ON SAME GROUND.

If a party, through his own neglect, makes an application to the Court on insufficient materials, and his rule is on that ground discharged, he cannot afterwards be allowed to supply the deficiency, and to renew his application. *Regina v. The Inhabitants of Barton*, 1021

SECURITY FOR COSTS.

See JUDGMENT, (AS IN CASE OF A NONSUIT), 9.

1. A party having assigned his property for the benefit of his creditors, to certain trustees, and afterwards taken the benefit of the Insolvent Act, and become bankrupt; in an action by the trustees, in his name, the Court required security for costs to be given to the defendant, but refused to allow him to plead a release, which the bankrupt was willing to give. *Elliott v Kendrick*, 195

2. The Court will not compel a re-

lator in a mandamus, to give security for costs, he being interested in the matter in question, on the ground of his poverty, or that other persons have induced him to apply for the writ. *Regina v. The Mayor and Corporation of Malmesbury*, 859

3. The poverty of a plaintiff is no reason for requiring security for costs. *Ross v. Jacques*, 737

4. Where in an action, by an infant, a person, (not the father,) was appointed prochein amy, who, it afterwards appeared was an uncertificated bankrupt, the Court stayed the proceedings until he should give security for costs, or another prochein amy should be appointed. *Watson v. Frazer*, 741

5. The Court refused to compel a plaintiff, who was a private in the East India Company's Service in India, to give security for costs, although it was sworn to be the custom of the company, to make their soldiers enlist for life, and not to allow them to return to England, unless discharged. *Garwood v. Bradburn*, 1031

6. The death of the lessor of the plaintiff in ejectment, taking place after verdict, and pending a rule for a new trial does not furnish a ground for the Court staying the proceedings, or calling on the plaintiff for security for costs, if the interest claimed by him was more than an estate for life. *Doe d. Cozens v. Cozens*, 1040

SERVICE.

See ARTICLED CLERK, 1, 2, 4.

SERVICE (OF DECLARATION).

Where a defendant is served personally with a writ of summons at his place of business, and he does not make any mention of a place of residence, different from his place of business, the plaintiff may serve notice of declaration there afterwards. *Hoare and Others v. Robinson*, 583

SHERIFF.

SERVICE (OF RULE).

1. Service of a rule to compute on the shopman of the person in whose house the defendant resides, is insufficient. *James v. Westdale*, 104

2. Service of a rule to compute on a female who is sworn to be part of the defendant's family, and who promises to give the copy rule to the defendant, is sufficient. *Weeden v. Lipman*, 111

SERVICE, (SPECIAL).

See SPECIAL SERVICE.

SERVICE (OF WRIT).

See SUMMONS, 2.

SET-OFF.

See COSTS, (INTERLOCUTORY).
TAXATION, 5.

SEVERAL, (COUNTS).

See DISCONTINUANCE.

SEVERAL DEFENDANTS.

See RULE, (SERVICE OF), 3.

SEVERAL PLAINTIFFS.

See SMALL DEBTOR, 4.

SHERIFF.

See NEW TRIAL, 1.
PLEA, 8.

1. Though a sheriff is put to extra trouble and expense in making a levy, he cannot claim larger fees than those allowed by the table of fees, framed under the 7 Wm. 4, and 1 Vict. c. 55. *Slater v. Haines*, 221

2. A sheriff is only entitled to poundage upon the real debt, bona

SHERIFF'S RETURN.

fide due, therefore, where the plaintiff took a debtor in execution, by virtue of a writ of ca. sa., indorsed, by mistake for a larger sum than that really due, and the mistake in the indorsement was afterwards amended by a judge's order. *Held*, that the sheriff's claim to poundage must be regulated accordingly. *Evans and Another v. Maners*, 256

3. *Semble*, In an action against a sheriff for an escape, he stands in the same situation as the original defendant, and may reduce his liability by any equities which the defendant would have had against the plaintiff. Per *Abinger*, C. B. *Parke*, B., dubitante, *Ib.*

4. The general rule is, that where a plaintiff appoints a special bailiff, he cannot rule the sheriff to return a writ of fi. fa.: but where such a rule has been obtained, and the object was to procure a return of nulla bona, with a view to sue out a writ of ca. sa., the Court discharged a rule obtained on the part of the sheriff to set that rule aside, upon payment of costs by the plaintiff, the plaintiff also undertaking not to bring an action. *Harding v. Holder*, 659

5. Where it appeared that on an execution in an action on a replevin-bond, a greater sum had been endorsed on the writ, and levied, than that to which the plaintiff was entitled, and that amount had been paid over to the plaintiff, the Court would not, at the instance of the sheriff, or a second execution creditor, compel the plaintiff to refund the overplus. *Bowser, Assignee of the Sheriff of Carmarthenshire v. Lloyd*, 1029

SHERIFF'S NOTES.

See WRIT OF TRIAL, 1.

SHERIFF'S RETURN.

1. If the sheriff returns that the premises of the defendant are so barri-

SMALL DEBTOR. 1109

caded, that he is unable to ascertain whether the defendant has goods within the bailiwick, on which a levy may be made, it is a bad return, as he should state either that the defendant has goods, or that he has none. *Munk v. Cass*, 332

2. It is a sufficient return of a sheriff to a writ of fi. fa., that he has seized goods of the defendant by virtue of several previous writs of fi. fa., "according to their priority." *Chambers v. Coleman*, 588

3. The sheriff must state some amount as the value of the goods seized, but the omission to do so, is only an irregularity, and therefore, where a return so far defective was made on the 6th of March, it was held too late on the 24th of April following, to object to the return on that ground, *Ib.*

4. Where an attachment is issued against the sheriff for not returning a writ of venditioni exponas, it is no objection to an application to stay proceedings under the attachment on terms, that it is strictly regular, and the sheriff in contempt, and although the application is made after a return to the fi. fa. in which the value of the goods seized was not stated. *Regina v. The Sheriff of Herts, in a cause of Charles Dod v. Thomas Coleman*, 916

SHORT-HAND NOTES.

See TAXATION, 1.

SIGNATURE, (OF COUNSEL).

See PLEA, 11.

SMALL DEBTOR.

1. Service on one of two plaintiffs, who undertakes to accept service on behalf of both, is sufficient to entitle a defendant to his discharge, under 48 Geo. 3, c. 123. *Faulkner and Another v. Hasler*, 138

2. Where a defendant who is a marks-woman, applies for her discharge under the 48 Geo. 3, c. 123, it must appear in the jurat to her affidavit, supporting the application, that it has been marked by her. *Wilson v. Blakey*, 352

3. In order to entitle a defendant to the benefit of the 48 Geo. 3, c. 123, the Small Debtors' Act, he must remain in *actual* custody during twelve successive calendar months; if he enjoys the privilege of the rules during any part of that period, he is disentitled to that benefit. *Eiffe v. Jacob*, 345

4. Service upon one of several plaintiffs of the defendant's intention to apply for his discharge, under the 48 Geo. 3, c. 123, s. 1, is sufficient for a rule absolute in the first instance. *Harris and Another v. Turtle*, 808

5. Where on an application to discharge a prisoner out of custody under the provisions of the 48 Geo. 3, c. 123, s. 1, for a debt exceeding 20*l.*, the prisoner proposed to shew, by affidavit, that the debt had been reduced below 20*l.* before action brought: the Court refused to entertain the motion on that ground. *Curtis v. Rickards*, 845

SMUGGLING.

A proceeding under the Smuggling Act, the 4 & 5 Wm. 4, c. 13, is a "criminal matter," and, therefore, a writ of habeas corpus to bring up a defendant who has been committed under that act, should issue from the *Crown* side of the Court. But if it is issued from the *Plea* side, the objection only amounts to an irregularity, which is waived, if the solicitor for the Customs appearing before a judge to oppose the defendant's liberation, does not take the objection previous to an order for the defendant's discharge being made. *In Re Eaton*, 207

SPECIAL SERVICE.

SOLDIER.

See SECURITY FOR COSTS, 5.

SPECIAL CASE.

At the trial of a cause, a verdict was ordered to be entered for the plaintiffs, subject to the decision of the Court, upon a special case to be stated between the parties. The defendant subsequently became bankrupt, the Court refused, upon application, to set aside the verdict, and enter a verdict for the defendant, but directed that a new trial might be had between the parties. *Cottam and Another v. Partridge*, 629

SPECIAL JURY.

1. The general rule is, that the party who obtains an order for a special jury must use the utmost diligence to get the jury ready, by the time for which notice of trial has been given, and therefore, if the defendant obtains a rule for a special jury, the non-attendance of the plaintiff at appointments requisite in procuring a special jury, the defendant is not necessarily excused for not having the jury ready in due time. *Chuck v. Harris*, 68

2. If a defendant, for the purpose of delay, obtains a rule for a special jury, the Court will permit him to have it tried by such a jury, but will compel him to try it in its order pursuant to the notice of trial, although on a day when the usual practice is not to take special juries. *Bush v. Pring* 180

SPECIAL SERVICE.

See SUMMONS, 1.

Semble, that the Court will not grant a rule permitting the service of notices in the cause, by sticking them up in the Master's office in reference to more than the immediate notice

STAMP.

sought to be served. *Davies v. Jenner*, 45

STALE, (AFFIDAVIT).

See AFFIDAVIT, 3.

STAMP.

See ARBITRATION, 5, 20.

1. A bond dated in June, was conditioned for payment of 3,000*l.* with interest, at 5 per cent., from March preceding: *Held*, that a 7*l.* stamp was sufficient. *Parker and Another v. Smart*, 211

2. An agreement for the sale of a public house, stated, that the sale was subject to the covenants set forth "in a draft of a lease delivered this day." The agreement itself contained less than 1080 words: *Held*, that the covenants referred to, were not to be taken into account, in calculating the amount of stamp duty, and that, therefore, a 1*l.* stamp was sufficient. *Snee-
zum v. Marshall*, 267

3. By an indenture of apprenticeship, the apprentice was bound to serve his Master for five years and a half; a deed of assignment transferred the services of the apprentice to a new master for the remainder of the term of five years and a half, and the deed recited that instead of providing the apprentice with certain wages, stipulated for in the original indenture, the new master would find him in food, lodging, and washing, for the remainder of the said term, and one year more; the deed then bound the apprentice to his new master for that additional term: *Held*, that under the provisions of the Stamp Act, (55 Geo. 3, c. 184,) the deed of transfer was liable only to 1*l.* assignment stamp, and that no additional duty was payable on the creation of the new term of service. *Morris v. Cox* 661

4. Where an attorney applies to be struck off the rolls at his own request,

STAYING PROCEEDINGS. 1111

the affidavit supporting the application, must be stamped. *Ex parte Watkins*, 974

STATUTE (DESCRIPTION OF).

It is incorrect to plead a statute as passed in the first and second years of the reign, &c., but the statute may be stated to have passed in a session, held in the first and second years, &c. *Gibbs v. Pike and Another*, 731

STATUTE (OF LIMITATIONS.)

The exception in the Statute of Limitations, (21 Jac. 1, c. 16, s. 3,) as to merchants' accounts does not apply to an action of indebitatus assumpsit, but only to the action of account, or, *semble*, to an action on the case for not accounting. *Ingliss and Another v. Haigh*, 817

STATUTE (PLEA BY).

See PLEA, 1, 12, 16, 17.

STAYING PROCEEDINGS.

See BRIGHTON COURT OF REQUESTS.
COSTS OF THE DAY.

JUDGMENT AS IN CASE OF A NON-SUIT, 3.

RENDER, 3.

REPLICATION, 4.

SECURITY (FOR COSTS), 6.

1. In an action brought to recover the sum of 2*l.* 8*s.* 9*d.*, for goods sold and delivered, which was tried before the sheriff, the plaintiff sought to prove his claim by evidence of an admission made by the defendant at the time of service of the writ of summons, that he owed "the debt," but the witness declined to swear that the defendant had previously read the indorsement on the writ, so as to render his admission applicable to the sum claimed, and the plaintiff recovered only 1*s.* damages; the Court, under such circumstances, refused to make a

1112 STET PROCESSUS,

rule absolute to stay proceedings, upon payment of 1s., the amount of damages, or to enter final judgment for the plaintiff without costs. *Bachelor v. Dudley*, 384

2. The Court will not stay proceedings in an action, although it is distinctly sworn that the sum claimed has been recovered in a former action between the same parties, and that the plaintiff is in poor circumstances, and unable to pay costs if he fails. *Ross v. Jacques*, 737

3. Where a rule was obtained for staying proceedings in ejectment until the costs of former actions of ejectment, and for mesne profits were paid on the ground of the same title being again in dispute, the rule will be discharged if the lessor of the plaintiff swears generally that his claim is not founded on the same title as was previously litigated, although he does not state under what title he does claim. *Doe d. Bailey and Another v. Bennett and Wife*, 1012

STAY OF PROCEEDINGS.

The defendant having on the 19th of November, delivered a demurrer to a declaration, wrongly entitled, the plaintiff, on the 20th, signed judgment for want of a plea. On the 21st, the defendant obtained a summons at Chambers, to set aside the judgment, and on the same day, the plaintiff obtained a rule nisi to compute. Before the summons was heard, the plaintiff made the rule to compute absolute: *Held*, that the summons operated as a stay upon the proceedings of the plaintiff, and that the rule absolute to compute must be set aside. *Trego v. Tatham*, 379

STET PROCESSUS.

See ARBITRATION, 14.

JUDGMENT AS IN CASE OF A NON-SUIT, 1.

SURPRISE.

STREET.

See JUDICIAL NOTICE.

STRIKING OUT PLEA.

See PLEA, (STRIKING OUT.)

SUBMISSION, (REVOKING.)

See ARBITRATION, 3.

SUBPOENA.

See ATTACHMENT, 1, 3.
WITNESS, 5, 6.

SUGGESTION.

See COSTS, 3.
COUNTY COURT.

SUMMONS.

See AFFIDAVIT, 2.
DISTRINGAS, 11.
IRREGULARITY, 1.
WAIVER, 1.

1. Where a defendant's place of abode cannot be found, although letters left at his uncle's house for the defendant, are answered by him, the Court will not allow service of a writ of summons at the uncle's to be good service. *Sainsbury v. Thorp*, 183

2. Where the copy of a writ of summons was indorsed "This writ was issued by A. B., of, &c., attorney for the said ——" without mentioning whom, the Court set aside the copy and service for irregularity. *Ward v. Lloyd and Another*, 213

SUPERSEDEAS.

See ERROR.

SURPLUSAGE.

See PLEA, 14.

SURPRISE.

1. Where a verdict is for a sum

less than 20l., unless practice or fraud on the part of the plaintiff is shewn, the Court will not disturb the verdict on the ground of surprise. *Bransdon v. Didsbury*, 199

2. On the trial of a cause, the plaintiff, an attorney, to support a claim for work done by him in preparing accounts to be laid before the Legacy Duty Office, by the defendant, as executor, subpoenaed a clerk in the Legacy Duty Office to produce the accounts, bearing the defendant's signature. The clerk did not produce them, as no application with that view had been made to the comptroller: *Held*, that there was no surprise, and the Court refused to set aside a nonsuit which had been entered. *Austen v. Evans*, 408

TAXES.

See WARRANT.

TAXATION.

See ATTORNEY, (BILL OF), 1, 4.
COSTS, INTERLOCUTORY.
PLKA, 8.

1. The following rule was promulgated upon the discussion of a rule nisi in this Court:—"It is ordered that the plaintiffs should be at liberty to proceed to the trial of this cause, on payment, by the said plaintiffs, to the defendants, of the costs of the day of the 20th of February, 1836, and on payment by the plaintiffs to the defendants of the costs of, and occasioned by the applications to this Court:" *Held*, that in taxing the costs, the Master, under the head of costs of the day, correctly refused to allow the costs attending the summoning a special jury, and of an application to the Court by the defendant to postpone the trial, and that under the head of costs of, and occasioned by the applications to the Court, he properly disallowed costs of consultations

antecedent to these motions, and costs of a short-hand writer's notes of discussions in the Court of Chancery, upon a subject connected with the suit, and upon which the parties were required to report to the Court. *Morgan v. Miller and Another*, 51

2. In an action on an attorney's bill, plea, *nunquam indebitatus*, it is competent for the plaintiff to shew that a greater amount is due to him than the Master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause, in which the costs were incurred. *Beck v. Cleaver*, 111

3. The Court of Queen's Bench will not direct the bill of an attorney for business done in bankruptcy, to be taxed by its own officer. *In re Hawker*, 188

4. On taxation of costs, if doubt exists, as to whether a witness was material and necessary, and the Master allows the charge upon the certificate of counsel in the cause, the Court will not review the taxation. *Marshall v. Parsons*, 251

5. Where an action is brought against an attorney, and he pleads a set-off of his bill for business done in Equity only, the Court will not direct his bill to be taxed. *Slater v. Brookes*, 349

6. In an action against the sheriff for his neglect to execute a writ, when the cause was called on for trial, the plaintiff withdrew the record, in consequence of the absence of a material witness. At the taxation of the costs of the day, the Master allowed the costs of two of the officers of the sheriff to whom the writ had been directed, and who were in attendance to give evidence. The Court refused to grant a rule to review the taxation, on the ground that the witnesses were incompetent. *Curling v. Fitzgerald*, 394

7. Where upon the taxation of an attorney's bill of costs, between at-

torney and client, it appeared that charges were made in respect of business done, and disbursements made, during a period in which the attorney, although an attorney of the Queen's Bench, was not qualified to practise in the Common Pleas, (the charges having arisen before the statute 7 Wm. 4, and 1 Vict., c. 56) and those charges were struck off; the Court held, that the Master, in making that reduction was right, and that the total amount of the bill being thus reduced by more than one-sixth by such taxation, the attorney was liable to pay the costs of taxation. *Newton v. Harland and Another*, 641

8. The directions to taxing officers authorizing them to allow 1*l.* 18*s.* for declaration, &c., on a bill of exchange do not apply where more than one action is brought on the same bill, but in such a case, the declarations must be taxed according to their length. *Phipps v. Field*, 738

TENDER.

See ATTACHMENT, 1.
CARRIER.

Though a party tendering money, demands a receipt for the sum tendered, if no objection is made on that account, the tender is good. *Richardson v. Jackson*, 715

TERM.

See ARBITRATION, 8.

TIME, (CALCULATION OF).

See ARBITRATION, 2.
ATTORNEY, (BILL OF), 3.
JURISDICTION OF JUSTICES.

TITLE.

See PLEA, 3.

VACATION.

TOLLS.

See REPLICATION,

TRAVERSE.

See REPLICATION, 10.

TRAVERSE, (ARGUMENTATIVE).

See PLEA, 10.

TRESPASS.

See COSTS, 1.
PLEA, 8.

TRIAL, (POSTPONING).

See POSTPONING TRIAL.

TROVER.

See REPLICATION, 4.

TRUSTEE.

See DEPOSIT IN LIEU OF BAIL, 4.

TUBMAN.

See ATTORNEY-GENERAL.

UMPIRE.

See ARBITRATION, 21.

UNIFORMITY, (OF PROCESS ACT.)

See APPEARANCE.

UNION (POOR LAW).

See BASTARD, 4.

USURY.

See REPLICATION, 4.

VACATION.

See PLEA, 2.
REPLEVIN, 3.

VARIANCE.

See AMENDMENT, 3.

PARTICULARS, 2, 3.

1. If a notice of a declaration varies, in describing the form of action, from the writ, the defendant may move to set aside the declaration, and need not confine his application to the notice.

Robinson v. Everington, 107

2. The plaintiff declared upon a guarantee by the defendant, and alleged that the defendant had requested him to lend to one R. B., the sum of 24*l.*, and that in consideration of the premises, and that he would lend and advance the further sum of 2*l.* per week, the defendant undertook to pay as well, the said sum of 24*l.*, and the said further sum of 2*l.* per week, and "such other sums as the said plaintiff should so lend and advance to the said R. B." The guarantee proved in evidence, was in the following terms:—"I beg that you will continue to advance the sum of 2*l.* per week to R. B., and I hereby engage to repay to you all moneys you may advance to him, in addition to the 24*l.* you have already let him have at my request:" *Held*, that there was a variance between the record and the guarantee, but that it was amendable under the provisions of the statute, 9 Geo. 4, c. 15. *Smith v. Brandram*, 430

3. The plaintiff, in his declaration, claimed not only the amount which he had advanced at the rate of 2*l.* per week, but the further sum of 138*l.* The defendant, at the trial, combated his liability to pay any part of the whole amount alleged to be due; *Held*, that he was prejudiced by the variance, within the provisions of the 3 & 4 Wm. 4, c. 42, s. 23, only so far as the amount of 138*l.* went, and that as to any part of his defence, directed against that claim, he was entitled to his costs. *Ib.*

4. The plaintiff declared upon an agreement, by which the defendant undertook to become answerable for certain sums of money, and give security for their payment, upon the stay of proceedings in an action against himself; and that proceedings were stayed by an order of a judge. The defendant pleaded that the order of the judge directed a conditional stay of proceedings only; the plaintiff replied, taking issue upon the stay of proceedings: Evidence being given of the order of the judge, imposing a condition before the proceedings were stayed: *Held*, that the defendant was entitled to a verdict. *Filmer v. Burnby*, 446

5. To a declaration in assumpsit for an attorney's costs in an action commenced by him against the defendant, the defendant pleaded that he was always ready and willing to pay a just and reasonable sum in satisfaction of the demand, and that before the commencement of the suit, he offered to pay such just and reasonable sum: It was proved that he had offered to pay the costs when the bill was taxed: *Held*, that such evidence did not support the plea, and that the plaintiff was entitled to a verdict. *Ib.*

6. The declaration stated an agreement, by which, "amongst other things," the plaintiff undertook to manage a factory for the defendants, in consideration whereof the defendants promised to pay. The agreement, when produced at the trial, was found to contain stipulations that the plaintiff would give his whole attention to the defendant's business, and would not convey his knowledge with regard to the intended business of the factory to any other person: *Held*, that there was no variance; but that if there was, the declaration was amendable under the 3 & 4 Wm. 4, c. 42, s. 23. *Clark v. Morrell and Others*, 461

1116 VENUE, (CHANGING).

VENDOR AND PURCHASER.

See *PLEA*, 10.

VENUE.

1. In an action for the breach of warranty of a horse, the venue was changed by the defendant, and brought back into Middlesex, upon the usual terms of giving material evidence in that county.

Held, that evidence of payment for the keep of the horse in that county satisfied the undertaking. *Greenway v. Titchmarsh*, 279

2. In support of an application to enter a suggestion to try a cause in Nottinghamshire instead of Lincolnshire, upon the ground that the lessor of the plaintiff could not have a fair and impartial trial in the former county, an affidavit was produced, alleging that two attorneys, whom the lessor of the plaintiff had successively employed to conduct the cause had abandoned his interest, the one on account of a bribe paid to him by the defendant, the other on account of an intimacy which existed between him and the defendant, and also that the defendant was a person of large property, and possessing great influence in the county, and that he had said that he would "do as he liked at Lincoln," more especially as the lessor of the plaintiff was a poor man: *Held*, insufficient. *Doe dem. Hickman v. Hickman*, 364

3. The Crown has no prerogative right in an information of intrusion, to lay the venue in any county, or to issue a venire facias juratores into a different county from that in which the venue is laid. *The Attorney-General v. Lord Churchill*, 772

VENUE, (CHANGING).

See *VENUE*.

WARRANT.

VIDELICET.

The day on which it was alleged the plaintiff was ejected by the defendant, and that when possession was recovered by the former, are not material in a declaration in trespass for mesne profits, although they are not stated under a videlicet. *Ive v. Scott and Another*, 993

WAIVER.

See *NOTICE TO JUSTICES*, 4.

1. A writ of summons was sued out in the month of May, but was not served upon the defendant within the four months, during which it ran under the provisions of the 2 Wm. 4, c. 39. In the following month of November, the defendant called at the office of the plaintiff's attorney, and then consented to accept service of a copy of the writ, in order to avoid further expense: *Held*, a waiver of the objection, that the operation of the writ had ceased. *Coates v. Sandy*, 381

2. In the month of November, 1839, one of two defendants, (husband and wife) applied to a judge at Chambers for leave to change his attorney on the record, on the ground that certain pleadings of the co-defendant were opposed to his interests. The application was refused, but an indemnity was ordered to be given to preserve him from any consequences of his name being used in the cause. Various proceedings were subsequently taken in the action, but in Hilary Term, 1841, an application, similar in its nature to that at Chambers, was made to the Court, but the decision of the judge at Chambers having being so long acquiesced in, was held to be conclusive. *Wynne v. Wynne*, 396

WARRANT.

Where a warrant for the apprehen-

sion of a defaulter, under the 3 Geo. 4, c. 88, s. 3, was issued by commissioners of taxes of the Cambridge district, and it was backed by justices of Lancashire and Gloucestershire, and on a return to a habeas corpus, it appeared that the defendant was in custody on the warrant in Cambridge gaol, the Court refused to discharge him, on a suggestion that he had been apprehended at Cheltenham, being clearly in legal custody at Cambridge. *Ex parte Sharpe*, 513

WARRANT OF ATTORNEY.

1. Since the rule 1 Reg. Gen., H. T., 2 Wm. 4, s. 73, a rule absolute, in the first instance, for judgment on a warrant of attorney more than ten years old cannot be granted, although the defendant, shortly before the application, has acknowledged the debt to be due. *Nicholas and Others v. Merit*, 101

2. On moving to sign judgment on a warrant of attorney, it is not a sufficient excuse for not producing an affidavit of the attesting witness, that an application to a person acquainted with the witness's address, has been unsuccessful in obtaining it, although the handwriting of the defendant, and the witness to the warrant of attorney is verified. *Cope v Lea*, 102

3. What is sufficient proof that a defendant is alive, so as to authorise the signing of a judgment on an old warrant of attorney. *Goodman v. Trevanion*, 328

4. A warrant of attorney given by an attorney to induce a party to stay proceedings against him on a rule for striking him off the roll, is illegal and void, and the Court will direct it to be taken off the file and cancelled. *Kirwan v. Goodman*, 330

5. The Court will, under special circumstances, allow a rule to be made absolute on an old warrant of attorney, where the service has been effected on

the landlady of the house in which the defendant lodges. *Wortham v. Tuck*, 335

6. To render a warrant of attorney void as against the assignees of a bankrupt, under the provisions of the 3 Geo. 4, c. 39, ss. 1 & 2, on the ground of its not having been filed, or judgment signed within twenty-one days of the date of its execution, it is not necessary that the petitioning creditor's debt shall have accrued within the same twenty-one days. *Everett and Another, Assignees v. Wells*, 424

7. A warrant of attorney to confess judgment for 1000*l.* was executed by the defendant, and an attestation of the execution was subscribed by an attorney, pursuant to stat. 1 & 2 Vict. c. 110, s. 9. An alteration was afterwards made by consent, in the sum, by substituting 2000*l.*, and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The attorney, who was present, wrote his initials opposite to the alteration, and drew a dry pen over the attestation, and over each letter of his own signature: *Held*, that the warrant of attorney was not duly attested under the 9th section of the statute. *Bailey and Another v. Bellamy and Others*, 507

8. Under the 3 Geo. 4, c. 39, s. 1, which requires that every warrant of attorney, to confess judgment, shall be filed "within twenty-one days after the execution," a warrant executed on the 9th day of the month, may be filed on the 30th. *Williams v. Burgess*, 544

9. A consent to a judge's order for judgment and execution is not within the 9th section of the 1 & 2 Vict. c. 110, and therefore, the order is valid, though neither the defendant nor his attorney attended before the judge. *Braine v. Manson*, 748

10. B. being indebted to C., in the sum of 42*l.*, handed over to him a bill

of exchange, drawn by one P. upon, and accepted by himself for that amount; B. subsequently took the benefit of the Insolvent Act, 7 Geo. 4, c. 57, and was discharged from his liability upon the bill of exchange. P., in the meantime, had been sued upon the bill, by C., and had been arrested upon judgment obtained in the action; B., upon his discharge, in consideration of the release of P. from custody, gave a warrant of attorney to C. for the amount of the bill, and also for the costs in the action brought by him against P., and certain costs incurred in the Insolvent Court, in opposing his own discharge: Upon application to set aside judgment and execution on the warrant of attorney, under the 60 and 61 sects. of the Insolvent Act: *Held*, that the instrument was invalid, as to the amount of the original debt, but that the judgment must remain in force for the amount of costs, which formed its new consideration. *Collins v. Benton*, 905

11. Where a trader, having contracted a debt, gave a warrant of attorney to secure its payment specifically, and the creditor sought to enforce that security against the goods of the debtor, in respect of subsequent advances made by the creditor, the Court, at the instance of the assignees, set aside the proceedings of the creditor.

The Court would not, on the affidavit of the plaintiff, that he understood that the warrant of attorney was intended to cover subsequent advances, extend the defeasance to those advances. *Bell v. Tidd*, 949

12. Where it appeared that an attorney was acting both for plaintiff and defendant in a transaction in the course of which a warrant of attorney was given, and that instrument was attested by a clerk of the attorney, he being also an admitted attorney, it was held, that the attestation was in-

sufficient within the 1 & 2 Vict., c. 110, s. 9. *Durrant v. Blarston and Caley*, 1015

13. A warrant of attorney to secure advances of money made by a banking company to a particular firm, was executed to the manager of the company, appointed under the 7 Geo. 4, c. 46, s. 9, authorized him, "his executors or administrators," to enter up judgment. His administratrix, who was his widow, took out a prerogative administration in the province of Canterbury, the parties who had given the warrant of attorney residing within the province of York, at the time of her husband's death: *Held*, that as the judgment was to be entered up in the province of Canterbury, the prerogative administration in that province was sufficient to authorize her to enter it up.

The warrant of attorney was less than ten years old, and, therefore, a rule for judgment would, pursuant to 1 Reg. Gen., H. T., 2 Wm. 4, s. 73, be absolute in the first instance, but the Court would only allow a rule nisi under the particular circumstances of the case. *Edwards, Administratrix of Edwards v. Holiday and Others*, 1023

WARRANTY.

See VENUE, 1.

WITNESS.

See TAXATION, 6.

1. Where a witness has been called, and after he has been dismissed by the party calling him, it is discovered, from private information, that the witness is incompetent, from interest, and the party, for whom he appears, re-calls him merely to inquire as to the existence of his interest, the objection to the incompetency will not be allowed to prevail. *Fellingham v. Sparrow*, 141

2. In an action at the suit of the Crown, the Court has no power to

issue a mandamus for the examination of witnesses in India. *Regina v. Wood*, 310

3. An examination of a witness, vivâ voce, before the Master, under the 1 Wm. 4, c. 22, cannot be taken until after issue joined. *Mondell v. Steele*, 812

4. It is no ground of objection to a rule for examining a witness vivâ voce, before the Master, pursuant to 1 Wm. 4, c. 22, s. 4, that it is suggested that he is unwilling to submit to cross-examination, or that he is the son of the party applying, if he appears to be independent of his father's influence. *Carruthers v. Graham and Others*, 947

5. In a subpoena to a witness to give evidence in an action of ejectment, the names of the lessors of the plaintiff should be introduced. *Doe d. Clarke and Others v. Thomson*, 948

6. If the original writ of subpoena requires the witness to appear on the 27th of May, and the copy served requires him to appear on the 24th, an attachment for disobedience cannot be obtained. *Ib.*

WRIT OF TRIAL.

See COUNTY COURT.
NEW TRIAL, 2, 4.

1. Motions respecting causes tried by writ of trial must be made on affidavit, verifying the judge's notes, as well where the trial took place, before the judge of an inferior Court of Record, as before the sheriff. *Eden v. Bretton*, 254

2. The first count of the declaration was, for not using premises in a tenant-like manner; the second, for use and occupation; the third, on an account stated. The damages stated in the declaration were 50*l.* The writ of summons was indorsed for 17*l.*, and the particulars claimed 15*l.* for rent, and 2*l.* damages for non-repair and improper use of premises. A verdict was found for the plaintiff. The Court set aside the proceedings, on the ground that it was not a case within the meaning of the 3 & 4 Wm. 4, c. 42, s. 17, but without costs, as the defendant might have objected to the order being made, or moved to set it aside when made. *Roffey v. Shoo-bridge*, 957

YARMOUTH, (CORPORATION OF).

The Corporation of Great Yarmouth has no claim under 5 & 6 Wm. 4, c. XLIX. (local) to compensation, pursuant to 59 Geo. 3, c. 54, s. 9, and 1 & 2 Vict. c. 113, s. 27, for the diminution of duty on foreign vessels, importing and exporting commodities into and out of the haven, in consequence of commercial conventions between England and Foreign Powers, notwithstanding the general language of s. 128 of the Local Act, with reference to the previous provisions of that act. *Regina v. The Corporation of Trinity House, Deptford Strond*, 565

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